

[2026 LiveLaw \(SC\) 813](#)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SANJAY KAROL; J., NONGMEIKAPAM KOTISWAR SINGH; J.
CIVIL APPEAL NOS. 10169-10170 OF 2013; AUGUST 13, 2026

PAZHANATHAL (DEAD) THROUGH LRS. & ORS.

versus

ALAMATHAL (DEAD) THROUGH LRS. & ORS.

Indian Succession Act, 1925 — Section 63(c) — Indian Evidence Act, 1872 — Section 68 — Proof of execution and attestation of Will — Dual statutory requirement — Distinction between Scribe and Attesting Witness — Animus Attestandi - Sections 63 of the Indian Succession Act and 68 of the Evidence Act perform related but distinct functions - Section 63 prescribes what must have occurred when the Will was executed, whereas Section 68 prescribes the ordinary manner in which the occurrence of those acts must be proved - Proof of the testatrix's signature or thumb impression alone does not establish due execution unless the statutory attestation by at least two witnesses is proved - The concession in Section 68 permitting examination of only one attesting witness does not dilute the requirement that the witness examined must be capable of proving the complete statutory execution of the Will, including attestation by both witnesses - A scribe who signs the document merely to authenticate authorship and not *animo attestandi* cannot be treated as an attesting witness, nor can his testimony cure the lack of proof of attestation under Section 68. [Relied on *N. Kamalam v. Ayyasamy*, (2001) 7 SCC 503; *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91; Paras 50–59, 60–68, 70–71]

Indian Evidence Act, 1872 — Sections 68 & 69 — Invocation of Section 69 — Proof where no attesting witness can be found — Conditions Precedent — Evidentiary Burden - Section 69 is not an alternative which the propounder may freely choose, but an exceptional mode of proof available only when proof through an attesting witness has become impossible - The opening condition "if no such attesting witness can be found" requires strict proof that the witnesses are dead, beyond the jurisdiction, untraceable despite diligent search, or incapable of giving evidence - A bare, unparticularised statement by an interested propounder regarding the death of a witness, unsupported by credible oral or documentary evidence or enquiry, is insufficient to invoke Section 69 - The mere absence of a contrary suggestion in cross-examination cannot reverse the statutory burden or establish the foundational fact required to bypass Section 68 - Even if Section 69 is applicable, proving the handwriting of one attestor and the mark of the testatrix only satisfies the formal limb and does not create a presumption of capacity, free will, or elimination of suspicious circumstances. [Relied on *Babu Singh v. Ram Sahai alias Ram Singh*, (2008) 14 SCC 754; Paras 72–76, 78–85, 96–98]

Indian Succession Act, 1925 — Sections 59 & 61 — Indian Evidence Act, 1872 — Section 68 — Testamentary Capacity, Sound Disposing Mind, and Cumulative Suspicious Circumstances - Proof of physical execution or thumb impression of an illiterate testatrix does not dispense with the necessity of proving testamentary capacity, sound disposing mind, and conscious approval of the dispositions - Where a registered Will exhibits multiple suspicious circumstances incorrect recital describing ancestral property inherited from the husband as "self-acquired", describing a step-daughter as own daughter without disclosure of true relation,

unexplained exclusion of other legal heir branches, attestation by a close relative of a beneficiary, witnesses brought from another village, beneficiary branch in proximate control/possession, unexplained custody, and non-examination of the key surviving person (the step-daughter) best placed to explain the family arrangement—the court must evaluate the cumulative effect - Registration and subsequent survival of the testatrix for years do not by themselves remove legitimate suspicions where independent evidence of informed, free agency is lacking. *[Relied on Bharpur Singh v. Shamsher Singh, (2009) 3 SCC 687; Paras 99–104, 110–121, 122–134]*

Hindu Succession Act, 1956 — Section 15(2)(b) — Devolution of property inherited by female Hindu dying intestate and issueless - Where the Will propounded by one branch fails for lack of legal proof and failure to remove suspicious circumstances, the testatrix is deemed to have died intestate - property inherited by an issueless female Hindu from her husband does not devolve under general rules of Section 15(1), but reverts to the heirs of the husband under Section 15(2)(b) - The heirs representing the branches of the predeceased wives are entitled to their proportionate partition shares accordingly. *[Paras 136–139]*

For Appellant(s): Mr. S Nagamuthu, Sr. Adv. Mr. N. L. Ganapathi, AOR Mr. Sidhant Garg, Adv.

For Respondent(s): Mr. Sathyanarayanan, Sr. Adv. Mr. B.Karunakaran, Adv. Mr. Bhaskaran, Adv. Ms. Pooja Lakshmi, Adv. Mr. Lakshman Raja, Adv. Mr. S. Gowthaman, AOR Dr. Pooja Jha, Adv. Dr. R. Prakash, Adv. Ms. Nandita Jha, Adv. Mr. Mukesh Kumar, Adv. Mr. Akash, Adv. Mr. Vishwa Pal Singh, AOR

J U D G M E N T

NONGMEIKAPAM KOTISWAR SINGH, J.

1. Leave having been granted on 01.11.2013, these civil appeals arise out of the common judgment and decree dated 28.10.2008 passed by the High Court of Judicature at Madras in A.S. No. 231 of 1991 and Tr. A.S. No. 503 of 2002. By the impugned common judgment, the High Court allowed both first appeals preferred by the Respondents herein and decreed the Respondents' suit for permanent injunction by setting aside the common judgment and decree dated 22.01.1991 passed by the Trial Court, Additional Subordinate Judge - III, Coimbatore in O.S. No. 665 of 1985 and O.S. No. 1344 of 1990. The Trial Court had granted a preliminary decree for partition in favour of the Appellants in O.S. No. 665 of 1985 and dismissed the Respondents' suit for permanent injunction in O.S. No. 1344 of 1990.

2. The dispute is a family succession and partition dispute, centered on the legal proof, genuineness and effect of a registered Will dated 15.12.1976, marked as Ex.B-13, alleged to have been executed by Arukkaniammal, the issueless third wife of Vaiyapuri Gounder, the original owner. If Will (Ex.B-13) is proved in accordance with law, the respondent branch succeeds in respect of the A-schedule property. If the Will is not proved, the property inherited by Arukkaniammal from her husband would devolve, by operation of Section 15(2)(b) of the Hindu Succession Act, 1956 ("Hindu Succession Act" for short), upon the heirs of Vaiyapuri Gounder, and the appellants would be entitled to their share as per the partition decree granted by the Trial Court.

3. The principal question, therefore, is, whether the Will (Ex.B-13) is proved valid. That question requires the Court to distinguish between testamentary power, due execution and attestation, the statutory mode of proof, and the independent obligation of the propounders to remove suspicious circumstances. The validity of the Will is therefore the central issue, the questions of partition, possession and injunction being consequential.

FACTUAL BACKGROUND

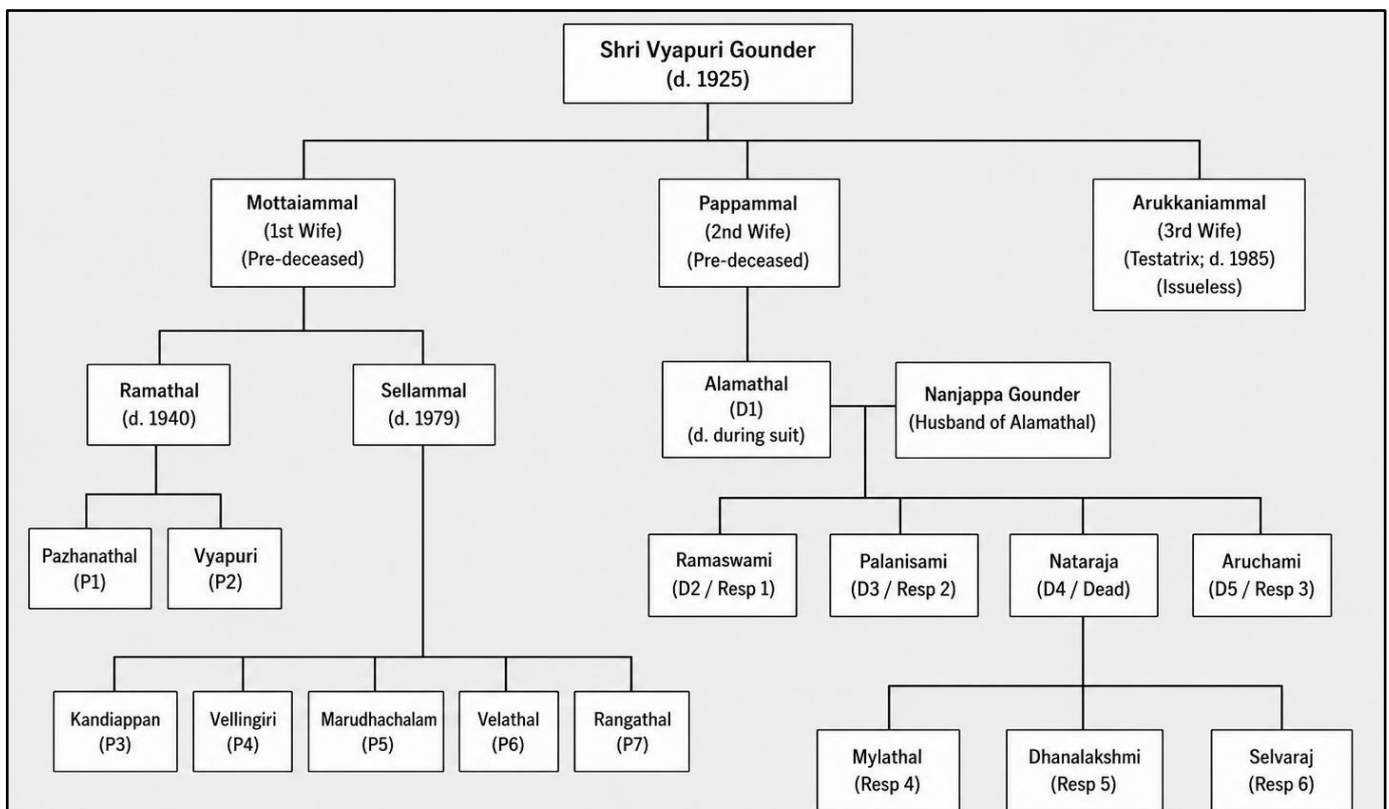
4. One Vaiyapuri Gounder was the original owner of the suit properties. The suit properties consisted principally of agricultural lands described as A-schedule properties and a house property described as B-schedule property. Partition of B-schedule house property is not contested, also it is not in dispute that the properties came to Vaiyapuri Gounder in a partition between himself and his brothers.

5. Vaiyapuri Gounder had three wives. The first wife was Mottaiammal (Appellant Branch). The second wife was Pappammal (Respondent Branch). The third wife was Arukkaniammal (Testator). The first two wives predeceased Vaiyapuri Gounder. On the death of Vaiyapuri Gounder in or about 1925, Arukkaniammal alone survived him. She had no children.

6. Mottaiammal, the first wife, had two daughters, namely Ramathal and Chellammal. The Appellants in the present appeals claim through the said two daughters of Mottaiammal. Pazhanathal and Vaiyapuri represent the line of Ramathal. Kandappan, Vellingiri, Marudhachalam, Velathal and Rangathal trace their claim through Chellammal.

7. Pappammal, the second wife, had one daughter, Alamathal. The contesting Respondents are Alamathal and four sons of Alamathal, namely Ramaswami Gounder, Palaniswami Gounder, Nataraja Gounder and Aruchami Gounder, with the legal representatives of deceased parties being brought on record at different stages.

8. There is also no dispute that, on the death of Vaiyapuri Gounder, Arukkaniammal being his sole surviving wife, became entitled to the suit properties. The Trial Court also recorded that the properties belonging to Vaiyapuri Gounder, that on his death would devolve on Arukkaniammal, and that after her death, if she died intestate and without issue, the properties inherited by her from her husband would devolve upon the heirs of the husband under Section 15(2)(b) of the Hindu Succession Act. For convenience, the genealogy chart concerning these Civil Appeals reproduced hereinbelow:



9. The case of Appellants-legal heirs of the first wife is that Arukkaniammal died issueless and intestate on 18.09.1985, the properties inherited by her must revert to the surviving heirs of Vaiyapuri Gounder, the original owner. On that basis, they claim that the branch of Mottaiammal would be entitled to 2/3 share, because the branch had two out of three surviving daughters and the branch of Pappammal, represented by Alamathal, would be entitled to 1/3 share, because the branch had the remaining one surviving daughter.

10. The Respondent branch belonging to the second wife does not dispute the broad genealogy or the fact that Arukkaniammal was the absolute owner during her lifetime. Their answer to the partition claim of the legal heirs of the first wife branch is founded on two documents and the possession said to flow from them. The first is a registered lease deed dated 10.04.1943 said to have been executed by Arukkaniammal in favour of Nanjappa Gounder, the husband of Alamathal. The second is the registered Will dated 15.12.1976, Will (Ex.B-13), said to have been executed by Arukkaniammal in favour of the four sons of Alamathal.

11. The Will, as translated in the record, states that Arukkaniammal was old, that she had no scope of living for a long time, that she was in possession of the property described thereunder, and that the property belonged to her by selfacquisition. It then states that after her lifetime, since she had no male issue, her grandsons, described as the male issues of her daughter Alamathal, namely Ramaswami Gounder, Palaniswami Gounder, Nataraja Gounder and Aruchami Gounder, shall derive absolute title and enjoy the property. The document bears the left thumb impression of Arukkaniammal. It names Marappa Gounder and Avanashi Gounder, both of Karacheri, as attesting witnesses, and records that it was written by K.S. Srinivasa Rao.

12. The description of the property in Will (Ex.B-13) substantially corresponds to the A-schedule agricultural property. No Will was relied upon in respect of the B-schedule house property.

13. The first legal proceeding was O.S. No. 665 of 1985 initiated by the Appellants' branch of the first wife for partition and separate possession of 2/3 share in the suit properties. Their plaint pleaded the genealogy, the title of Vaiyapuri Gounder, the absolute right of Arukkaniammal after his death, her death issueless and intestate, and the consequent devolution under Section 15(2)(b) of the Hindu Succession Act.

14. The plaint further alleged that Alamathal and her husband (belonging to the Respondent-second wife branch) had close association with Arukkaniammal in her lifetime and had exercised undue influence over her. It was also pleaded that the first defendant was refusing amicable partition and was asserting absolute title without producing any document. After a notice dated 07.10.1985, the first defendant did not send a reply accepting partition. According to the plaintiffs, the subsequent assertion of a Will dated 15.12.1976 was false, fabricated and not binding on their 2/3 share.

15. The Respondent branch (belonging to the 2nd wife) filed written statements in O.S. No. 665 of 1985. They admitted the relationship of parties and also admitted that, after the death of Vaiyapuri Gounder, Arukkaniammal became entitled to the entire suit property. However, they denied that she died intestate. Their case was that Arukkaniammal leased out the entire property to Nanjappa Gounder under the registered lease deed dated 10.04.1943 and that, thereafter, on 15.12.1976, she executed a registered Will in favour of the four sons of Alamathal. It was further pleaded that the plaintiffs were never in possession and that the village knew of the Will.

16. The second proceeding was O.S. No. 1344 of 1990. It was filed by Nanjappa Gounder and his sons (belonging to the Respondent-2nd wife branch) for permanent injunction restraining the Appellants' branch from entering the property or disturbing their alleged possession. The suit for injunction repeated the case of lease, cultivation, possession, tenancy registration, electric connection and title under the Will. The defendants in that suit contended that it was a counterblast to the partition suit and that an injunction could not be granted against co-owners.

17. Both suits were tried together and disposed of by a common judgment dated 22.01.1991 by the Trial Court. Since the claim in the second suit O.S. No. 1344 of 1990 substantially depended on the Will and on the title asserted by the Respondent branch, the Trial Court rightly treated the proof and genuineness of Will (Ex.B-13) as the central issue.

ISSUES AND EVIDENCE BEFORE THE TRIAL COURT

18. In the partition suit O.S. No. 665 of 1985, the Trial Court framed the following issues: *firstly*, whether the Will dated 15.12.1976 alleged to have been executed by Arukkaniammal in favour of defendants 2 to 5 was true and valid; *secondly*, whether the plaintiffs were entitled to partition as claimed; and *thirdly*, to what other reliefs the parties were entitled.

In O.S. No. 1344 of 1990, the issue was whether the plaintiffs therein were entitled to permanent injunction.

19. The evidence led before the Trial Court may be noticed with some care because the correctness of the High Court's reversal has to be examined in the light of that evidence. P.W.1 Vellingiri (fourth plaintiff) and P.W.2 Palaniswami (a witness examined on behalf of the plaintiffs who claimed to have treated Arukkaniammal) were examined. Four documents were marked on the plaintiffs' side.

20. The documents marked on the side of the plaintiffs included Ex. A-1, patta granted to Arukkaniammal; Ex. A-2, the copy of notice dated 07.10.1985 issued by the plaintiffs' counsel to the first defendant; Ex. A-3, the postal acknowledgment card; and Ex. A-4, a copy of a lease deed. These documents were relied upon to establish the title of Arukkaniammal, the demand for partition, and the plaintiffs' case that the Respondent branch did not have exclusive title.

21. On the side of the defendants, D.W.1 Ramaswami Gounder (second defendant), D.W.2 K.S. Srinivasa Rao (scribe/document writer of Will-Ex. B-13) and D.W.3 Mylasami (son of Marappa Gounder, one of the attesting witnesses to Will-Ex. B-13) were examined. The defendants marked Exs. B-1 to B-14. Ex. B-1 was the lease deed dated 10.04.1943 said to have been executed by Arukkaniammal in favour of Nanjappa Gounder. Exs. B-2 to B-4 were extracts from tenancy registers. Ex. B-5 was patta granted to Alamathal. Exs. B-6 and B-9 were house-tax receipts. Exs. B-7 and B-8 were demand notices issued by the Tamil Nadu Electricity Board. Ex. B-10 was an elector's card. Ex. B-11 was an electricity service-charge card. Ex. B-12 consisted of kist receipts. Ex. B-13 was the Will dated 15.12.1976. Ex. B-14 was the reply notice dated 18.10.1985 issued by the first defendant.

22. P.W.1 Vellingiri (fourth plaintiff) supported the case of intestacy and joint entitlement. In cross-examination, he denied the suggestion that Arukkaniammal had executed the Will dated 15.12.1976 in favour of defendants 2 to 5. He also denied that Arukkaniammal was in good health and possessed a sound disposing state of mind until her death. He

accepted that Arukkaniammal used to affix her thumb impression. He further denied that the A-Schedule property had been leased to Nanjappa Gounder, the husband of Alamathal, in 1943 or that the Respondent branch had remained in exclusive possession and enjoyment of that property.

23. P.W.2 Palaniswami (plaintiffs' witness who claimed to have treated Arukkaniammal) deposed that the suit property originally belonged to Vaiyapuri Gounder. He stated that Arukkaniammal stayed in her house and in her *thottam* (farm house), that she had suffered from disease for a considerable period, and that he had treated her. He further stated that Arukkaniammal used to say that, after her lifetime, shares should be given to the children of Ramathal and Sellammal/Chellammal. In the cross-examination, P.W.2 Palaniswami admitted that the alleged statement regarding equal shares was oral and had not been reduced to writing. He could not recall when the statement was allegedly made. He also admitted that there was no documentary record of the natural treatment allegedly administered by him to Arukkaniammal.

24. D.W.1 Ramaswami Gounder (second defendant) stated in his examination-in-chief that Arukkaniammal had leased the property to his father, Nanjappa Gounder; that the Respondent branch had remained in possession from the date of Ex. B-1; that they had dug the well and installed the electric motor; that Arukkaniammal had lived with them; and that they had maintained her until her death. He further stated that, in 1976, Arukkaniammal executed the Will concerning the A-Schedule property in favour of the four sons of Alamathal. D.W.1 Ramaswami Gounder (second defendant) also deposed that, approximately four months before her death, Arukkaniammal called the four beneficiaries and handed over the Will to them; that the plaintiffs had never possessed or enjoyed the property; that Arukkaniammal remained in good health and possessed a sound disposing state of mind until her death; and that both attesting witnesses to the Will were dead.

25. In the cross-examination of D.W.1 Ramaswami Gounder (second defendant), he admitted that the suit property was the ancestral property of Vaiyapuri Gounder. He also admitted that Arukkaniammal was illiterate. He acknowledged that Marappa Gounder, one of the attesting witnesses, was the father-in-law of Nataraja Gounder, another beneficiary under the Will. He further admitted that Avanashi Gounder, the other attesting witness, belonged to Karacheri, situated approximately three kilometres away. D.W.1 He also admitted that patta in favour of the Respondent branch was issued only after the institution of the suit and that, prior thereto, the patta stood in the name of Arukkaniammal. He stated that his mother, Alamathal, was approximately 75 years old and capable of appearing before the Court, nevertheless, Alamathal did not appear nor examined.

26. D.W.2 K.S. Srinivasa Rao (scribe/document writer of Will Ex. B-13) stated in his examination-in-chief that he had written the Will; that Marappa Gounder and Arukkaniammal had requested him on the previous day to prepare it; that the relevant records were brought to him; that Arukkaniammal supplied the instructions; that he wrote the Will near the Registrar's office; that he read over the contents to Arukkaniammal; that she accepted the contents and affixed her thumb impression; and that Marappa Gounder and Avanashi Gounder thereafter signed as attesting witnesses. D.W.2 K.S. Srinivasa Rao (scribe of the Will) further stated that Arukkaniammal was in good health at the time of preparation and execution of the Will.

27. In cross-examination, however, D.W.2 K.S. Srinivasa Rao, the scribe stated that he had signed the document only as its scribe and not as an attesting witness. He did not know how the property had devolved upon Arukkaniammal, nor was he familiar with her family. He was not present when the Will was registered and did not know Nanjappa

Gounder. D.W.2 K.S. Srinivasa Rao admitted that the property had been described in the Will as the self-acquired property of Arukkaniammal and also stated that, where the property is genuinely self-acquired, the particulars of the sale deed would ordinarily be mentioned. Although he denied the suggestion that he, Marappa Gounder and others had joined together to fabricate Will (Ex. B-13), the Trial Court considered his evidence with caution.

28. D.W.3 Mylasami (son of Marappa Gounder, one of the two attesting witnesses to Will-Ex. B-13, and brother-in-law of beneficiary Defendant 4 - Nataraja Gounder) stated that his father had died approximately ten years earlier and that he was familiar with his father's signature. He identified the signatures of his father appearing on Will (Ex. B-13). In the cross-examination, D.W.3 Mylasami admitted that his elder sister had been given in marriage to Nataraja Gounder, one of the beneficiaries under the Will and the brother of D.W.1 Ramaswami Gounder. He stated that he had seen Will (Ex. B-13) for the first time only on the date on which he gave evidence and that he had come to the court along with his brother-in-law, Nataraja Gounder. He did not know whether Avanashi Gounder, the other attesting witness, had left behind any legal heirs. D.W.3 Mylasami also stated that he had last seen Arukkaniammal four or five years earlier and that he did not belong to her village.

JUDGMENT OF THE TRIAL COURT

29. The Trial Court first recorded the admitted facts. It noted that the A and B schedule properties belonged to Vaiyapuri Gounder; that he had three wives; that Arukkaniammal was the only surviving wife at the time of his death; that she became absolutely entitled to the properties; and that the parties before the Court represented the heirs of the first and second wives of Vaiyapuri Gounder.

30. The Trial Court then held that, in the absence of a valid Will, Section 15(2)(b) of the Hindu Succession Act would apply. It held that the property had come to Arukkaniammal through her husband and that on her death without issue, the property would devolve upon the heirs of Vaiyapuri Gounder. On such devolution, plaintiffs 1 and 2 through daughter Mottaiammal would together be entitled to 1/3 share, plaintiffs 3 to 7 would together be entitled to 1/3 share through daughter Sellammal, and the first defendant Alamathal would be entitled to 1/3 share.

31. The Trial Court then considered Will (Ex.B-13). It correctly adverted to the principle that a Will must be proved in accordance with law and that, where suspicious circumstances surround the Will, the propounder must remove those circumstances to the satisfaction of the Court.

32. The Trial Court found several suspicious circumstances. It noticed that Will (Ex.B-13) described the property as self-acquired though the property had come to Arukkaniammal from her husband. It found that the Will did not state why the heirs of Mottaiammal were excluded. It further noticed that the Will referred to Alamathal as if she were Arukkaniammal's own daughter, though Alamathal was the daughter of Pappammal, the second wife of Vaiyapuri Gounder. It also noticed that Marappa Gounder, one of the attesting witnesses, was the father-in-law of Nataraja Gounder, a beneficiary under the Will. The other attesting witness, Avanashi Gounder, was also from Karacheri village, and not from the village of the testatrix.

33. The Trial Court considered the plea that the Will was registered and that Arukkaniammal survived for many years thereafter. It held that those circumstances by themselves could not prove the Will. It further observed that Arukkaniammal was illiterate

and affixed her thumb impression. It examined the evidence as to her physical and mental condition and found that the defendants had not examined Alamathal, though she was central to their case and was stated to be capable of coming to the Court. The Trial Court also noticed that no independent person from the village had been examined regarding Arukkaniammal's mental and physical condition at the time of execution.

34. On the proof of attestation, the Trial Court held that D.W.3 identified the signature of his father Marappa Gounder but that no acceptable evidence had been produced regarding the death or unavailability of the other attesting witness, Avanashi Gounder. No death certificate of Avanashi Gounder had been produced and no steps had been taken to examine his relatives.

35. The Trial Court also rejected the attempt to treat D.W.2, the scribe, as an attesting witness. It held that D.W.2 had signed only as scribe and that *animus attestandi* could not be inferred. The Trial Court found his testimony unreliable, especially because he did not know the family of Arukkaniammal, did not know Nanjappa Gounder, did not know how the property belonged to Arukkaniammal, and yet wrote it as self-acquired.

36. On an overall appreciation, the Trial Court concluded that Will (Ex.B-13) was not true, valid or sustainable. Consequently, it decreed O.S. No. 665 of 1985 by granting a preliminary decree for partition declaring that the plaintiffs therein were entitled to 2/3 share in the A and B schedule properties. It dismissed O.S. No. 1344 of 1990, holding that the plaintiffs in the injunction suit could not obtain an injunction against other co-owners.

JUDGMENT OF THE HIGH COURT

37. The High Court reversed the Trial Court. It held that the ownership of Arukkaniammal was admitted and that the crucial issue was the genuineness of Will (Ex.B-13). It noticed that the defendants were the propounders of the Will and that the burden was on them.

38. The High Court accepted the respondents' reliance on Section 69 of the Evidence Act. It found that D.W.1 had spoken about the death of both attesting witnesses and that there was no cross-examination suggesting that the witnesses were still alive. It further relied on the evidence of D.W.2, the scribe, and D.W.3, the son of Marappa Gounder, who identified his father's signature. On that basis, it held that the requirement of Section 69 stood of the Evidence Act, satisfied.

39. The High Court also disagreed with the Trial Court's treatment of suspicious circumstances. It held that a Will, by its very nature, departs from normal succession, and therefore the fact that some heirs were excluded could not by itself be treated as suspicious. It further held that Arukkaniammal had reasons to prefer the sons of Alamathal because the respondent branch had been in possession, had taken care of her and had been managing the property. The High Court also held that describing the property as self-acquired could not be treated as a suspicious circumstance because Arukkaniammal had become absolute owner.

40. The High Court accordingly set aside the judgment and decree in O.S. No. 665 of 1985, upheld the Will in respect of Aschedule property, and decreed O.S. No. 1344 of 1990 for permanent injunction. It is this reversal which is under challenge before us.

BRIEF SUBMISSIONS OF THE PARTIES

41. On behalf of the appellants, it was submitted that the High Court gravely erred in accepting Will (Ex.B-13) as a valid Will without insisting on strict proof under Section 63(c) of the Indian Succession Act and Sections 68 and 69 of the Evidence Act. The appellants

submitted that a Will is not to be proved like an ordinary document and that the conscience of the Court must be satisfied.

42. It was urged that neither of the two attesting witnesses was examined. Section 69 of the Evidence Act, could be invoked only after establishing that no attesting witness could be found. The appellants submitted that the death or unavailability of Avanashi Gounder was never proved. D.W.1's bare assertion, made by an interested beneficiary, could not discharge that burden, especially when D.W.3 himself did not know whether Avanashi Gounder had legal heirs and no attempt had been made to trace or examine anyone from his family.

43. The appellants further submitted that D.W.2 was only the scribe and not an attesting witness. He had admitted that he signed as scribe and not as witness. His evidence could not be used to cure the absence of proof of attestation unless animus attestandi was established. Reliance was placed on ***N. Kamalam v. Ayyasamy, (2001) 7 SCC 503.***

44. On suspicious circumstances, the appellants submitted that the Trial Court had assigned detailed and cogent reasons. The property was wrongly described as self-acquired. Alamathal was described in the Will as her daughter. No explanation was given for excluding the heirs of the other wives. One attesting witness was related by marriage to a beneficiary. Both attesting witnesses came from another village. The Respondent branch was already in possession under an alleged lease and was in a position of advantage. The testatrix was illiterate and affixed a thumb impression. The central person, Alamathal, was not examined. It was, therefore, submitted that the High Court reversed the Trial Court on general observations without dealing with the cumulative effect of these circumstances.

45. On behalf of the Respondents, it was submitted that the High Court was correct. The Respondents urged that the Will was registered and Arukkaniammal lived for nearly nine years thereafter without revoking it. It was submitted that survival of the testatrix for several years after execution and registration is a factor supporting genuineness.

46. The Respondents submitted that D.W.1 had categorically stated that both attesting witnesses were dead and that this statement was not challenged in cross-examination. Once that evidence remained unrebutted, Section 69 of the Evidence Act was attracted. D.W.2 proved the execution and attestation, while D.W.3 identified his father's signature. Therefore, according to the respondents, the Will was proved in the manner required by law.

47. The Respondents also contended that there were no suspicious circumstances. According to them, Alamathal was brought up by Arukkaniammal and was treated by her as her own daughter. The Respondent branch cared for Arukkaniammal in her old age. The Respondent branch had been in possession under the lease since 1943, had improved the property, dug the well and obtained electricity connection. The Will was therefore natural and probable. It was submitted that the first appellate court was the final court of facts and its judgment should not be interfered with in an appeal under Article 136 of the Constitution.

ISSUES FOR CONSIDERATION

48. The main and central issue is whether the registered Will (Ex.B-13) dated 15.12.1976, was validly executed by Arukkaniammal and proved in the manner required by law. The principal issue may conveniently be divided into the following questions:

(i) Whether Will (Ex.B-13)-Will Was duly executed and attested;

- (ii) Whether Section 69 of the Evidence Act was properly invoked;
- (iii) Whether testamentary capacity, knowledge of contents and free agency of the Will are satisfied;
- (iv) Whether the suspicious circumstances under the Will were satisfactorily removed;

ISSUE I: WHETHER Will (Ex.B-13) - WILL WAS DULY EXECUTED AND ATTESTED

49. The validity of the Will (Ex. B-13) must first be tested at the level of its execution and attestation. Arukkaniammal undoubtedly possessed testamentary power over the property held by her absolutely. The existence of such power, however, is distinct from proof that the particular instrument propounded by the respondents was executed by her as a Will in the manner prescribed by law.

50. Section 63 of the Indian Succession Act, 1925 prescribes the manner in which an unprivileged Will must be executed. The relevant provision reads:

“63. Execution of unprivileged wills.

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:

- (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.*
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.*
- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has 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.”*

51. The provision requires proof of three distinct acts. First, the testatrix must sign or affix her mark to the instrument. Secondly, the placement of that signature or mark must indicate an intention to give effect to the writing as her Will. Thirdly, the Will must be attested by at least two witnesses in the manner stated in clause (c). Each attesting witness must either witness the act of signing or affixing the mark, witness another person signing on the testatrix's direction, or receive a personal acknowledgment from the testatrix. Each witness must thereafter sign the instrument in the presence of the testatrix.

52. It is not necessary that both attesting witnesses should be present simultaneously, but what is indispensable is the substance of the statutory ceremony, that is the testatrix's execution or acknowledgment, the witnesses' awareness of that execution or acknowledgment, and their subscription of the instrument in her presence with the intention of bearing witness to that act.

53. The ordinary statutory mode of proving those acts was contained in Section 68 of the Evidence Act, which reads:

“68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

54. The words “not being a will” in the proviso are significant. Even a registered Will remains subject to the requirement of proof through an attesting witness where such a witness is alive, available and capable of giving evidence. Registration may furnish a supporting circumstance regarding genuineness, but it does not dispense with proof of testamentary execution and attestation.

55. Sections 63 of the Indian Succession Act and Section 68 of the Evidence Act perform related but distinct functions. Section 63 of the Indian Succession Act prescribes what must have occurred when the Will was executed. Section 68 of the Evidence Act prescribes the ordinary manner in which the occurrence of those acts must be proved before the Court. The two provisions must be read cumulatively. Proof of the testatrix's signature or thumb impression alone does not establish due execution of a Will unless the statutory attestation is also proved.

56. In ***N. Kamalam v. Ayyasamy, (2001) 7 SCC 503***, this Court explained the burden resting upon the propounder. The relevant paragraph reads:

“3. Turning on to the former expression onus probandi, it is now a fairly well-settled principle that the same lies in every case upon the party propounding the will and may satisfy the court's conscience that the instrument as propounded is the last will of a free and capable testator, meaning thereby obviously, that the testator at the time when he subscribed his signature on to the will had a sound and disposing state of mind and memory and ordinarily, however, the onus is discharged as regards the due execution of the will if the propounder leads evidence to show that the will bears the signature and mark of the testator and that the will is duly attested. This attestation however, shall have to be in accordance with Section 68 of the Evidence Act which requires that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution and the same is so however, in the event of there being an attesting witness alive and capable of giving the evidence. The law is also equally well settled that in the event of there being circumstances surrounding the execution of the will shrouded in suspicion, it is the duty paramount on the part of the propounder to remove that suspicion by leading satisfactory evidence.”

57. The principle is that the initial burden does not stand discharged merely by establishing that the mark appearing on the document belongs to the testatrix. The propounder must establish that the instrument represents the testamentary act of a free and capable testatrix and that it was attested in the manner required by Section 63(c) of the Indian Succession Act and free of suspicious circumstances.

58. In ***Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91***, this Court further explained the relationship between Sections 63 of the Indian Succession Act and 68 of the Evidence Act. The Court held that due execution cannot be established merely by proving the testator's signature, but proper attestation must also be proved. Although Section 68 permits the examination of only one attesting witness, the witness so examined must be capable of proving the complete statutory execution of the Will, including attestation by both witnesses in the manner contemplated by Section 63(c) of the Indian Succession Act. The decisive part of the ruling is:

“10. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be

dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act...

(emphasis added)

59. Thus, the concession granted by Section 68 of the Evidence Act, concerns the number of witnesses required to be examined in Court and it does not dilute the requirement that the Will itself must have been attested by at least two witnesses. One attesting witness may prove the entire ceremony. But where the witness examined proves only his own signature and is unable to prove the participation of the second attesting witness, the evidence falls short of establishing due execution under Section 63(c) of the Indian Succession Act.

60. With respect to the status of a scribe, a person who writes a Will is not, by reason of having written or signed it, necessarily an attesting witness. The act of writing and the act of attesting serve different legal purposes. The scribe authenticates his authorship of the writing. An attesting witness subscribes the document to bear witness to the testatrix's execution or acknowledgment of execution.

61. In *M.L. Abdul Jabbar Sahib v. H.V. Venkata Sastri & Sons, (1969) 1 SCC 573*, this Court explained that valid attestation requires not merely a signature but the intention to attest, that is *animus attestandi*. A person who signs only as a scribe, identifier or registering officer does not become an attesting witness unless the evidence establishes that he signed for the purpose of bearing witness to the executant's signature or acknowledgment. The relevant para reads as follows:

"8. ...It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness..."

62. This principle was directly applied to testamentary documents in *N. Kamalam* (supra). The Court held:

"25. The requirement of attestation presently in the country is statutory in nature, as noticed hereinbefore, and cannot as such be done away with, under any circumstances. While it is true that in a testamentary disposition, the intent of the attesor shall have to be assessed in its proper perspective but that does not however mean and imply non-compliance with a statutory requirement. The intention of the attesor and its paramount importance cannot thwart the statutory requirement. No doubt the scribe has subscribed his signature but a scribe in accordance with common English parlance means and implies the person who writes the document..."

63. The Court thereafter emphasised that the signature of a scribe cannot automatically be equated with the signature of an attesting witness. The controlling consideration is therefore not merely where the person signed, but why he signed and whether, while signing, he intended to attest the testatrix's execution.

64. Will (Ex. B-13) names Marappa Gounder and Avanashi Gounder as its two witnesses separate from Scribe, the person who wrote the instrument. Thus, the document itself distinguishes between its two attesting witnesses and its scribe.

65. In his examination-in-chief, D.W.2 - Scribe K. S. Srinivasa stated that Arukkaniammal supplied the instructions; that he wrote the Will near the Registrar's office; that he read it over to her; that she accepted its contents and affixed her left thumb impression; and that Marappa Gounder and Avanashi Gounder signed as witnesses. This testimony is relevant as evidence from a person claiming to have been present when the document was prepared and signed.

66. His cross-examination, however, leaves no scope for treating him as an attesting witness. D.W.2 expressly stated that he signed only after writing the words "written by"; that he did not sign as "written and witnessed"; and that he did not sign Will (Ex. B-13) as a witness. His own evidence therefore negatives the requisite *animus attestandi*.

67. Consequently, D.W.2's signature cannot be counted as a third attestation. Nor can it be invoked to replace either Marappa Gounder or Avanashi Gounder. His oral evidence may be considered for the limited purpose of deciding whether, under the exceptional mode of proof prescribed by Section 69, of the Evidence Act, the acts attributed to the testatrix and the named attesting witnesses stand established. It does not make D.W.2 an attesting witness and does not amount to compliance with Section 68 of the Evidence Act

68. The distinction is material. A person may have been physically present at the execution of a Will and may later testify about what he claims to have seen. But Section 68 of Evidence Act, specifically requires an attesting witness to be called, where one is alive and available. The evidence of a person who did not sign *animo attestandi* cannot be substituted for the evidence required by the provision merely because he describes the alleged execution in Court.

69. D.W.3 Mylasami (son of the attesting witness Marappa Gounder; brother-in-law of beneficiary D4) was not present when Will (Ex. B-13) was executed. He saw the document for the first time when he came to give evidence. He could identify only his father's signatures. He could not speak to Arukkaniammal affixing her thumb impression, the acknowledgment of that impression, or either attesting witness signing in her presence. His evidence therefore does not constitute proof under Section 68 of Evidence Act, though it may have relevance to one of the requirements of Section 69 of Evidence Act.

70. Neither Marappa Gounder nor Avanashi Gounder entered the witness box. The respondents' case is that both had died by the time of trial. Therefore, Will (Ex. B-13) was plainly not proved through the ordinary mode prescribed by Section 68 of Evidence Act. The evidence of DW 3 falls short of the requirement of proof an attestation in terms of Janki Narayan Bhoir (*supra*). The High Court could not treat the evidence of the scribe as though it were the evidence of an attesting witness, nor could the registration of the document cure the absence of proof under that provision.

71. We accordingly, hold that proof of attestation under Section 68 of the Evidence Act was therefore not satisfied and the question whether the respondents proved that no attesting witness could be found and whether the constituent requirements of Section 69 of the Evidence Act were established must therefore be considered separately under the next issue.

ISSUE II: WHETHER SECTION 69 OF THE EVIDENCE ACT WAS PROPERLY INVOKED AND SATISFIED

72. Having held under **Issue I** that neither of the two named attesting witnesses was examined and that Will (Ex. B-13) was not proved through the ordinary mode prescribed by Section 68 of the Evidence Act, the respondents could rely upon Section 69 of the Evidence Act only by establishing the factual conditions which permitted departure from

Section 68. The enquiry under Section 69 of the Evidence Act must proceed in a definite sequence: firstly, whether no attesting witness could be produced; secondly, whether the handwriting of at least one attesting witness was proved; and thirdly, whether the signature or mark of the testatrix was proved. These stages cannot be conflated. Section 69 of the Evidence Act, reads as follow:

“69. Proof where no attesting witness found.

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

73. The opening words, “if no such attesting witness can be found”, constitute the condition precedent. The remaining part prescribes the substituted mode of proof after that condition is established. Section 69 of the Evidence Act is, therefore, not an alternative which the propounder may freely choose, but it is an exceptional mode available only when proof through an attesting witness has become impossible.

74. The expression “no such attesting witness can be found” includes a situation where the witnesses are dead, beyond the jurisdiction of the Court, kept out of the way by the adverse party, incapable of giving evidence, or untraceable despite diligent search. The propounder must establish whichever ground of unavailability is relied upon. Where death is asserted, no particular form of proof, such as a death certificate, is invariably indispensable. Death may also be established through credible oral evidence from a close relative or another person having direct knowledge. What is essential is satisfactory proof that no attesting witness remained available for examination.

75. In ***Babu Singh v. Ram Sahai alias Ram Singh, (2008) 14 SCC 754***, the relevant discussion in paragraphs 17 to 19 reads:

“17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e. by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

18. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.

19. Indisputably, one of the attesting witnesses was dead. Our attention, however, has been drawn to the fact that a purported summons was taken out against the other attesting witness. Admittedly, it was not served. There is nothing on record to show that any step was taken to compel his appearance as a witness. The propounder did not make any statement in his deposition that the said witness had been won over by the opposite party. He did not say that despite service of summons the witness did not appear. It was only in answer to a question in cross-examination that he stated that he did not intend to examine the said witness. The witness might have been won over, but there had to be some evidence on record in that behalf. A bare statement by counsel that the attesting witness had gone out of the country could not be accepted when the propounder himself did not say so on oath, did not examine any other witness and did not make any further attempt to secure his attendance. A statement made through counsel cannot be treated as evidence for invoking Section 69.”

76. The decision makes clear that the reason for nonexamination of an attesting witness must itself be proved. Only after that foundation is established does the statutory relaxation operate.

77. In the present case, the availability of the two attesting witnesses must be examined separately. As regards Marappa Gounder, D.W.3 Mylasami (son of attesting witness Marappa Gounder; brother-in-law of beneficiary Nataraja Gounder) stated that his father had died approximately ten years earlier. Being his son, D.W.3 was a natural witness to speak about his father's death. There is no material suggesting that Marappa Gounder remained alive or available at the time of trial. The absence of a death certificate in these circumstances was not fatal, and Marappa Gounder's unavailability by reason of death was sufficiently established.

78. The position concerning Avanashi Gounder is materially different. The only affirmative statement regarding his death was made by D.W.1 Ramaswami Gounder (beneficiary under Will-Ex. B-13), who stated generally that "the two witnesses signed in the Will are dead". He did not state when or where Avanashi Gounder died, how he acquired knowledge of the death, whether he knew Avanashi personally, or whether he had made any enquiry from Avanashi's family or village.

79. The non-production of Avanashi Gounder's death certificate would not, standing alone, defeat the respondents' case, but the difficulty is the absence of other natural form of supporting evidence like, non-examination of the relative of Avanashi; no resident of Karacheri was called to speak about his death; no public or village record was produced; and no witness described any attempt made to ascertain whether he was alive, dead or traceable.

80. This omission assumes particular significance in the light of D.W.3's evidence. D.W.3 resided in Karacheri and stated that Avanashi Gounder belonged to the same village, which had about 300 houses. Yet D.W.3 did not state that Avanashi was dead, but he stated that he did not even know whether Avanashi had legal heirs. Thus, a witness belonging to Avanashi's own village, who was examined by the respondents, did not corroborate the assertion of his death.

81. D.W.2, the scribe, also did not establish Avanashi Gounder's death or subsequent unavailability. His evidence was confined to the alleged execution in 1976. Although he stated in chief-examination and re-examination that Avanashi signed the Will, he admitted in cross-examination that he did not know Avanashi Gounder. He gave no evidence regarding Avanashi's position at the time of trial.

82. The Trial Court's finding was that no acceptable evidence had been led to establish Avanashi Gounder's death and that no attempt had been made to examine his relatives or otherwise ascertain his availability, which was a serious foundation where its concern was the defense in the case of the propounders.

83. The High Court reversed that finding principally because D.W.1's statement that both witnesses were dead had not been specifically challenged in cross-examination. It is true that the absence of cross-examination on a material fact may add weight to the testimony. That principle, however, is one of appreciation of evidence and it does not mean that every unparticularised statement must be accepted as conclusive merely because the opposite party did not suggest the contrary.

84. Further more importantly, the absence of a contrary suggestion could not reverse the statutory burden. The respondents sought to displace the ordinary requirement under Section 68 of the Evidence Act by invoking Section 69 of Evidence Act. It was therefore

for them first to prove that no attesting witness could be found. The appellants were not required to establish that Avanashi Gounder was alive before the respondents produced reliable evidence of his death or other unavailability. The High Court treated the absence of crossexamination as shifting the burden even before the foundational fact had been satisfactorily established.

85. We accordingly hold that the statutory gateway between Sections 68 and 69 of the Evidence Act was not satisfactorily crossed. Marappa Gounder's death was proved, but Avanashi Gounder's death or other unavailability was not. As long as the possibility remained that one named attesting witness was alive and capable of being produced, the respondents could not bypass Section 68 and proceed directly under Section 69 of the Evidence Act.

86. Nevertheless, since the High Court proceeded on the basis that Section 69 of the Evidence Act was applicable, it is appropriate to consider whether the two substantive requirements of that provision were otherwise fulfilled.

87. The first requirement was proof that the attestation of at least one attesting witness was in that witness's handwriting. In this regard, it would be appropriate to refer to Section 47 of the Evidence Act which reads as follows:

"47. Opinion as to handwriting, when relevant.

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.- A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."

88. D.W.3 stated that he knew his father's signature and identified the two signatures appearing on Will(Ex. B-13) as those of Marappa Gounder. His sister was married to Nataraja Gounder, one of the beneficiaries, and D.W.3 came to the Court along with Nataraja. Those circumstances required cautious assessment of his evidence, but they did not make him legally incompetent to identify his father's signature. A son may naturally be acquainted with his father's signature even though he is related to one of the beneficiaries.

89. D.W.3's evidence was, therefore, capable of satisfying the first formal limb of Section 69 of the Evidence Act by proving that the signatures attributed to Marappa Gounder were in Marappa Gounder's handwriting. However, the limits of his evidence must be kept clear that D.W.3 was not present when Will (Ex. B-13) was executed and saw it for the first time on the date of his deposition. He could not prove that Marappa actually saw Arukkaniammal affix her thumb impression, received her acknowledgment, or signed the Will in her presence. His evidence proved the identity of the handwriting; it did not constitute credible evidence of the ceremony of attestation.

90. The very purpose of Section 69 the Evidence Act is to permit proof through handwriting when an attesting witness cannot be produced. Thus, once the statutory gateway is assumed to have been crossed, D.W.3's inability to speak to the actual execution does not prevent his evidence from satisfying the limited requirement concerning one attester's handwriting. However, it means that no independent attesting

witness was available to describe the actual manner in which Will (Ex. B-13) was executed.

91. The second requirement was proof that the signature or mark of the executant was that of the executant. Section 67 of the Evidence Act states:

“67. Proof of signature and handwriting of person alleged to have signed or written document produced.

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”

92. Arukkaniammal was illiterate and ordinarily affixed her thumb impression. The corresponding enquiry was therefore whether the left thumb impression appeared on Will (Ex. B-13) belongs to Arukkaniammal.

93. D.W.2 stated that Arukkaniammal gave the instructions, that he wrote and read over the document to her, that she accepted it and affixed her thumb impression in his presence, and that Marappa Gounder and Avanashi Gounder thereafter signed. Although D.W.2 was only the scribe and not an attesting witness, that circumstance did not make him incompetent to testify about the physical act which he claimed to have personally witnessed. His testimony was therefore relevant to the second limb of Section 69 of the Evidence Act concerning the testatrix’s mark.

94. At the same time, D.W.2’s evidence required careful scrutiny. He admitted that he did not know Arukkaniammal’s family or the source of her title, did not know Nanjappa Gounder, did not know Avanashi Gounder and was not present at registration. These admissions did not necessarily disprove his assertion that he saw the thumb impression being affixed. However, they reduce the degree of independent assurance available regarding the preparation, contents and surrounding circumstances of the testamentary transaction, together with the non-availability of primary witnesses.

95. Accordingly, if the applicability of Section 69 of the Evidence Act were assumed in favour of the respondents, D.W.3’s evidence was capable of proving the handwriting of one attesting witness and D.W.2’s direct account was capable of proving the thumb impression attributed to Arukkaniammal. To that limited extent, the two formal limbs of Section 69 of the Evidence Act could be regarded as supported by evidence.

96. That alternative conclusion does not cure the anterior failure to establish why Avanashi Gounder could not be produced. The evidence proving one attestor’s handwriting becomes relevant only after the Court is satisfied that no attesting witness can be found. It cannot retrospectively establish the condition which activates Section 69 of the Evidence Act.

97. Therefore, proof of the handwriting and thumb impression does not conclude the entire enquiry into the validity of the Will. Section 69 of the Evidence Act, substitutes a mode of formal proof where attesting witnesses are unavailable. It does not create a presumption that the testatrix understood every recital, freely adopted the testamentary scheme, possessed the requisite capacity, or acted free from suspicious circumstances. Those questions remain governed by the substantive principles relating to proof of Wills.

98. We, therefore, hold that Section 69 of the Evidence Act was not properly invoked because the Respondents failed to satisfactorily establish the death or other unavailability of Avanashi Gounder. Even assuming that the other provision was available, the evidence of D.W.2 and D.W.3 would establish, at its highest, the formal requirements concerning

the mark of the testatrix and the handwriting of one attesting witness. Whether Will (Ex. B-13) represented the conscious, informed and voluntary testamentary act of Arukkaniammal, and whether the suspicious circumstances were satisfactorily removed, must be examined under **Issues III and IV**.

ISSUE III: WHETHER TESTAMENTARY CAPACITY, KNOWLEDGE OF CONTENTS AND FREE AGENCY OF THE WILL ARE SATISFIED

99. The enquiry under this issue is distinct from the formal proof considered under **Issues I and II**. Proof that a thumb impression appearing on Will (Ex. B-13) belonged to Arukkaniammal would establish only the physical act attributed to her. For the document to operate as her Will, the respondents were also required to establish that, at the relevant time, she possessed testamentary capacity, understood the nature and effect of the dispositions contained in the instrument, and adopted them as the expression of her own free will. Section 59 of the Indian Succession Act, 1925 provides:

“59. Person capable of making wills.

Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1.- A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.- Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.- A person who is ordinarily insane may make a will during an interval in which he is of sound mind.

Explanation 4.- No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.”

100. From the above, it is clear that advanced age, illness, illiteracy, physical weakness or the use of a thumb impression does not, by itself, render a person incapable of making a Will, but the decisive question is whether the testatrix knew and understood what she was doing when the instrument was executed.

101. Section 61 deals with the separate but connected requirement of free agency. It provides:

“61. Will obtained by fraud, coercion or importunity.

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.”

102. Thus, the Court must distinguish between a disposition motivated by natural attachment and one produced by pressure which overbore the testatrix's independent judgment.

103. The governing principles were stated in ***H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443** and the relevant paragraph reads 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."

104. The passage identifies four connected elements: execution by the testatrix, a sound disposing mind, understanding of the dispositions, and voluntary adoption of the document. Proof of one element does not automatically establish the others.

105. The evidence of the Appellants must first be considered. P.W.1 Vellingiri (P4) asserted that Arukkaniammal had suffered from physical and mental incapacity from about 1975. P.W.2 Palaniswami (claimed to have treated Arukkaniammal) stated that she had been suffering from illness for a considerable period and that he had administered natural treatment to her.

106. That evidence is insufficient to support an affirmative finding that Arukkaniammal lacked testamentary capacity on 15.12.1976. P.W.2 produced no treatment record, could not specify the relevant dates with precision and did not identify any particular mental condition which prevented her from understanding her acts. Evidence that an elderly person was ill or received treatment does not, without more, establish that she was incapable of making a Will on the particular date of execution.

107. The case cannot therefore be decided on the footing that incapacity was positively proved by the Appellants. The question is whether the evidence produced by the respondents was sufficiently satisfactory to establish the positive requirements identified in **H. Venkatachala Iyengar** (supra).

108. The Respondents relied principally upon D.W.1 Ramaswami Gounder (beneficiary under Will-Ex. B-13) and D.W.2 K.S. Srinivasa Rao (scribe of Will-Ex. B-13). D.W.1 stated that Arukkaniammal remained in good health and sound mind until her death. D.W.2 stated that she personally gave the instructions for the Will; that he wrote the instrument; that it was read over to her; that she accepted its contents; and that she thereafter affixed her thumb impression.

109. If these statements are considered in isolation, they support the respondents on all three aspects: capacity, knowledge and voluntary execution. D.W.2's evidence, in particular is direct evidence concerning the alleged preparation and adoption of the document. The fact that he was only the scribe did not make him incompetent to speak about events which he claimed to have personally witnessed.

110. The reliability and sufficiency of that account must, however, be tested against his cross-examination and the contents of Will (Ex. B-13). D.W.2 admitted that he did not know Arukkaniammal's age, family circumstances or source of title; did not know how the property had come to her; did not know Nanjappa Gounder; and was not present when the Will was registered. He also admitted that he had written the document on the basis of the patta shown to him.

111. These admissions create a different difficulty by weakening the assurance that D.W.2 was in a position to verify that the material recitals and testamentary scheme truly originated from her informed instructions because the Will described the properties as her self-acquired properties, whereas the admitted case was that they had come to her from Vaiyapuri Gounder, it also described Alamathal as her daughter and Alamathal's sons as her grandsons without disclosing the actual step-relationship.

112. The descriptions of Alamathal and her sons are not necessarily false merely because the relationship was not biological. A person may naturally refer to a step-daughter who was brought up as her own as “my daughter”, but in the case of an illiterate testatrix who affixed a thumb impression, the Court requires reliable assurance that the material contents including the identity of the beneficiaries, exclusion of the other branches and description of the property were explained to her and consciously adopted by her.

113. D.W.2 stated generally that he read over the document and that Arukkaniammal accepted it. That evidence is relevant and cannot be ignored. However, more importantly, as he lacked knowledge of her family and source of title, his statement does not independently explain how the inaccurate or incomplete recitals entered the document or whether their legal and factual implications were understood by her. The physical act of reading a document aloud is not necessarily equivalent to proof that an illiterate testatrix understood and approved the precise testamentary scheme.

114. The need for further assurance becomes material because Will (Ex. B-13) did not merely make a minor preference among heirs. It conferred the entire A-Schedule property upon the four sons of Alamathal and excluded the Ramathal and Chellammal branches. Such a disposition was legally permissible. Nevertheless, where the Will substantially alters the ordinary line of succession, the evidence must demonstrate that the exclusion was the conscious decision of the testatrix and not merely a scheme prepared around her.

115. Alamathal was the most natural witness to explain that part of the respondents’ case. According to the respondents, Arukkaniammal had brought up Alamathal, regarded her as a daughter, lived with her family, was maintained by them and consequently intended to benefit her four sons. D.W.1 Ramaswami Gounder (beneficiary under Will-Ex. B-13) admitted that Alamathal was alive, approximately seventy-five years old and capable of appearing before the Court. She who was a crucial witness, nevertheless not examined.

116. Though, Alamathal was not an attesting witness, and her evidence could not have cured the defects under Sections 68 or 69 of the Evidence Act. Her importance under the present issue was different. She was the person best placed to speak about Arukkaniammal’s relationship with the beneficiary branch, her residence, day-to-day health, mental alertness and expressed intentions. Her non-examination deprived the respondents’ account of the most natural source of independent confirmation.

117. No other independent person familiar with Arukkaniammal’s daily life was examined. Neither a neighbour nor a resident of her village was called to state that she was mentally alert, understood her property and had expressed an intention to exclude two branches. The principal evidence on capacity and intention thus came from a beneficiary and the scribe whose knowledge of the family and property was admittedly limited.

118. The Appellants also alleged that Alamathal and Nanjappa Gounder exercised undue influence over Arukkaniammal. The burden of proving fraud, coercion or undue influence ordinarily rests upon the party who asserts it. The evidence does not justify a positive finding that any particular act of coercion, fraud or pressure was exercised when Will (Ex. B-13) was executed.

119. The correct conclusion must therefore be stated with precision. The Appellants have not established that Arukkaniammal was legally incapable of making a Will on 15.12.1976. Nor is there sufficient evidence for a positive finding that Will (Ex. B-13) was obtained by proved fraud, coercion or undue influence.

120. The failure lies in the Respondents' proof. In the circumstances of this case, an elderly and illiterate testatrix affixing a thumb impression, substantial exclusion of two branches, material recitals requiring explanation because of factual errors, the beneficiary branch's position of proximity, and the non-examination of Alamathal, the respondents did not produce sufficiently cogent and independent evidence that Arukkaniammal understood the nature and effect of the precise dispositions and freely adopted Ex. B-13 as her Will.

121. We accordingly, on examination of all the circumstances together, hold that testamentary incapacity was not affirmatively proved and the Respondents failed to establish with the degree of assurance required for a disputed Will that Ex. B-13 was the informed mental as well as physical act of Arukkaniammal. The connected question whether the circumstances surrounding the document generated legitimate suspicion, and whether those suspicions were satisfactorily removed, falls for consideration under Issue IV.

ISSUE IV: WHETHER THE SUSPICIOUS CIRCUMSTANCES UNDER THE WILL WERE SATISFACTORILY REMOVED

122. A suspicious circumstance is not a substitute for proof and cannot be invented merely because a Will departs from intestate succession. The Court must identify circumstances arising from the document or evidence which legitimately call for explanation. Once such circumstances exist, they must be considered cumulatively, and the propounder must remove the resulting doubt by cogent evidence.

123. This Court in ***Bharpur Singh v. Shamsheer Singh, (2009) 3 SCC 687***, identifies relevant illustrations and states their legal effect. The complete relevant paragraphs are:

"23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

- (i) the signature of the testator may be very shaky and doubtful or not appear to be his usual signature*
- (ii) the condition of the testator's mind may be very feeble and debilitated at the relevant time*
- (iii) the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason*
- (iv) the dispositions may not appear to be the result of the testator's free will and mind*
- (v) the propounder takes a prominent part in the execution of the Will vi) the testator used to sign blank papers*
- (vii) the Will did not see the light of the day for long*
- (viii) incorrect recitals of essential facts."*

"24. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not. It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with."

124. The first circumstance is the recital that the properties were Arukkaniammal's self-acquired properties. The evidence and the Respondents' own pleadings show that the properties had come to her from Vaiyapuri Gounder. Section 14(1) of the Hindu Succession Act enlarged her interest into absolute ownership and unquestionably gave her testamentary power. It did not retrospectively alter the historical source of acquisition. The High Court answered a question of power, whether she could bequeath, whereas the

Trial Court was addressing the accuracy of a material recital in a document allegedly dictated by an illiterate testatrix.

125. The error would not alone invalidate the Will. It assumes significance because D.W.2 admitted that he did not know how Arukkaniammal acquired the property and wrote on the basis of the patta shown to him. His further admission that particulars of the acquisition would ordinarily be mentioned if the property were genuinely self-acquired supports the Trial Court's concern that the recital might not have originated from an informed instruction by the testatrix.

126. The second circumstance concerns the description of Alamathal as “my daughter” and her sons as “my grandsons”. Alamathal was the daughter of Pappammal, the second wife of Vaiyapuri Gounder, and not the biological daughter of Arukkaniammal. The respondents offered a plausible social explanation that Arukkaniammal had brought up Alamathal and treated her as her own daughter, but which is not ordinarily acceptable for the legal instruments like Will, and that explanation could have been established by Alamathal herself, but she was withheld despite being available.

127. The third circumstance is the exclusion of the Ramathal and Chellammal lines. Exclusion of an heir is not suspicious merely because a Will changes the ordinary succession. The relevant question is whether, in the factual context, the preference appears to be the conscious choice of the testatrix. Here, an issueless widow dealing with property inherited from her husband excluded two of the three branches of the husband's heirs and gave the entire A-schedule to the four sons of the remaining branch. The Will states no reason for the exclusion. The respondents rely upon care and maintenance; but the best witness to that explanation, Alamathal, was not examined.

128. The fourth circumstance is the relationship of Marappa Gounder with a beneficiary. D.W.1 admitted that Marappa was the father-in-law of Nataraja Gounder, one of the four legatees. Also, D.W.3, Marappa's son, was the brother-in-law of Nataraja and he came to the Court with Nataraja and saw Will (Ex.B-13) for the first time on the day of his evidence. Relationship does not disqualify an attester or make his signature false. It does mean that the identification evidence is not wholly independent and must be weighed with the remaining circumstances.

129. The fifth circumstance is that both named attestors belonged to Karacheri rather than Arukkaniammal's village. No legal rule requires a Will to be witnessed by persons from the same village, and a distance of about three kilometres is not inherently suspicious. The circumstance becomes relevant only because the respondents asserted that the Will and their possession were well known locally, yet no independent local person was produced either to speak about execution or to establish the testatrix's health and intention.

130. The sixth circumstance is the position of the beneficiary branch. Nanjappa Gounder claimed possession under the 1943 lease, his family cultivated the land, effected improvements and, according to the respondents, maintained Arukkaniammal. These facts provide a natural reason for gratitude and preference. They also placed that branch in a position of proximity and practical control. The law does not presume influence from closeness or possession, but such a position calls for clearer independent proof when the entire benefit is conferred upon the same branch.

131. The seventh circumstance is the non-examination of Alamathal. Though, she was not a formal attesting witness and her examination could not have cured non-compliance with Sections 68 or 69 of the Evidence Act, her evidence was nevertheless central to the

respondents' explanation of the Will that Arukkaniammal treated her as a daughter, lived with her family, was cared for by them and naturally wished to benefit her sons. Withholding the person best placed to prove those facts materially weakened the explanation.

132. The eighth circumstance concerns custody and disclosure. D.W.1 stated that Arukkaniammal delivered the Will to the four beneficiaries about four months before her death, nearly nine years after execution. No independent witness to the delivery was examined and the evidence does not explain where the original remained during the intervening period. This circumstance reduces the assurance otherwise sought to be drawn from long survival and non-revocation.

133. The ninth circumstance is a defect in the asserted mode of proof that the Respondents did not satisfactorily establish the death or unavailability of Avanashi Gounder. A Will already requiring scrutiny cannot receive additional assurance from Section 69 of the Evidence Act when the foundation for invoking that provision is itself uncertain.

134. Each circumstance must be assigned its proper weight. The inaccurate recital, the description of the step-daughter, exclusion of two branches, relationship of one attester, different village of the witnesses, possession by the beneficiary branch, non-examination of Alamathal, unexplained custody and weak Section 69 of the Evidence Act foundation would not, separately, necessarily defeat the Will. Their cumulative effect is substantial. They required independent evidence demonstrating that Arukkaniammal herself understood and freely adopted the exact disposition. However, the High Court dealt with the circumstances separately and that method did not address the combined evidentiary picture. We agree with the Trial Court that the legitimate doubts were not satisfactorily removed.

CONCLUSION

135. Our conclusion in the light of the above discussion, is that Will (Ex.B-13) has not been proved as the lawful last Will and testament of Arukkaniammal in accordance with Section 63(c) of the Indian Succession Act read with Sections 68 and 69 of the Evidence Act. This conclusion concerns proof and enforceability of the instrument.

136. Upon failure of the Will, Arukkaniammal must be treated as having died intestate in relation to the suit properties. Section 15(2)(b) of the Hindu Succession Act provides that property inherited by a female Hindu from her husband or father-in-law shall, in the absence of any son or daughter of the deceased, including children of a predeceased son or daughter, devolve not upon the general heirs in Section 15(1) of the Hindu Succession Act, but upon the heirs of the husband.

137. The properties came to Arukkaniammal from Vaiyapuri Gounder and she died issueless. The Trial Court therefore correctly identified three lines among the heirs of Vaiyapuri Gounder: the line of Ramathal represented by plaintiffs 1 and 2 was entitled to one-third; the line of Chellammal represented by plaintiffs 3 to 7 was entitled to one-third; and the line of Pappammal represented by Alamathal was entitled to one-third. The plaintiffs in O.S. No. 665 of 1985 together represented the first two lines and were collectively entitled to two-thirds.

138. Will (Ex.B-13) substantially dealt only with the Aschedule agricultural lands and did not cover the B-schedule house property. The Trial Court rightly granted a preliminary decree in respect of both A and B schedules because both were included in the partition

suit and, once testamentary exclusion failed, ordinary succession governed the parties' shares.

139. Upon failure of Will (Ex.B-13), Section 15(2)(b) of the Hindu Succession Act governs succession. The preliminary decree declaring the plaintiffs in O.S. No. 665 of 1985 collectively entitled to two-thirds share in the A and B schedule properties must be restored, and O.S. No. 1344 of 1990 for permanent injunction must stand dismissed.

140. The appeals are accordingly allowed. The common judgment and decree dated 28.10.2008 passed by the High Court of Judicature at Madras in A.S. No. 231 of 1991 and Tr.A.S. No. 503 of 2002 are set aside.

141. The common judgment and decree dated 22.01.1991 passed by the Additional Subordinate Judge - III, Coimbatore in O.S. No. 665 of 1985 and O.S. No. 1344 of 1990 are restored. The parties may work out final division, possession, and other consequential equities in final-decree proceedings and in accordance with law. O.S. No. 1344 of 1990 shall stand dismissed. There shall be no order as to costs.

142. Pending applications, if any, shall stand disposed of.

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