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GORANTLA THATAIAH

v.

THOTAKURA VENKATA SUBBAIAH & ORS.

March 19, 1968

B [J. C. SHAH, V. RAMASWAMI AND G. K. MITTER, JJ.]

Will—Propounder taking prominent part in execution of and receiving benefit under—Principles regarding scrutiny of evidence of execution and sound disposing state of mind of testator.

One V lost his father when he was only 10 years old and thereafter lived along with his mother, in the house of the first defendant who was his maternal uncle. The first defendant had considerable influence over
C V as he was slow witted and below the average level of intelligence and understanding. V died when he was 24 years old. A few days before his death he executed a will by which he bequeathed his entire property to the first defendant absolutely with a direction that his mother should be maintained, and that, even if his mother lived separately from the first defendant, she was to have only a life interest in certain items which were also to be taken absolutely by the first defendant after her death. At the time of the execution of the will V was physically in a weak condition.
D The first defendant took a prominent part in summoning the attesting witnesses and the scribe and in procuring writing materials for the execution of the will. Evidence was given on behalf the first defendant that though V was delirious on the day previous to the execution of the will and also subsequent to that date, V was in a normal condition on the date of the execution of the will.

E On the question of the validity of the will,

HELD : The will was not executed in a sound disposing state of mind and was therefore not legally valid. [480 A-B]

In a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion. What are suspicious circumstances must be judged on the facts and circumstances
F of each particular case. If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case the court should proceed in a vigilant and cautious manner. [477 H; 478 A-B]

Barry v. *Butlin*, (1838) 2 Moo. P.C. 480, 482, *Fulton* v. *Andrew*, (1875) L.R. 7 H.L. 448, *Tyrrell* v. *Painton*, (1894) P. 151, 157, 159 and
G *Sarat Kumari Bibi* v. *Sakhi Chand & Ors.*, 56 I.A. 62, applied.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 431 of 1965.

Appeal from the judgment and decree dated August 22, 1963 of the Andhra Pradesh High Court in Appeal No. 554 of 1959.

H *H. R. Gokhale* and *K. R. Chaudhuri*, for the appellant.

D. Narsa Raju, S. T. Desai, A. Vedavalli and *A. V. Rangan* for the respondents.

The Judgment of the Court was delivered by

Ramaswami, J. This appeal is brought by certificate on behalf of the plaintiff from the judgment of the High Court of Andhra Pradesh in Appeal Suit No. 554 of 1959 dated August 22, 1963.

One Gorantla Tathiah, as the sole plaintiff, filed O.S. No. 2 of 1957 in the Court of the Subordinate Judge, Bapatla for possession of certain properties which had been left by Gorantla Veeriah when he died issueless on June 24, 1939. Originally, there were ten defendants in the suit. Defendant no. 1 is the maternal uncle of Veeriah and Defendant no. 2 and Defendant no. 3 are the sons of Defendant no. 1. Defendants nos. 4 to 8 were the alienees from Defendant no. 1's family. Defendants nos. 7, 9 and 10 did not contest the suit. Defendant no. 8 died in the course of the suit and his legal representatives were added as Defendants 11 to 14. Defendants 1 to 3 contested the suit on the ground that Defendant no. 1 became entitled to the properties of Veeriah under the will, Ex. B-4 dated June 17, 1939 which Veeriah executed in his favour. It was contended in the alternative that at the time when the reversion opened on the death of Veeriah's mother, Rattamma on October 1, 1956, Defendant no. 1 was the nearest heir and not the plaintiff, under the Hindu Succession Act (XXX of 1956) which had come into force on October 17, 1956. The Additional Subordinate Judge, Bapatla held that the will was true and genuine but it was not legally valid as it was executed by Veeriah at a time when he had no testamentary capacity. It was also held that the Hindu Succession Act did not apply to the facts of the case. The Additional Subordinate Judge accordingly granted a decree for possession of properties except item no. 4 in favour of the plaintiff as against Defendants nos. 1 to 3, 6, 7 and 11 to 14. Defendants 1 to 3, 7, 11 and 13 took the matter in appeal to the High Court of Andhra Pradesh. The plaintiff also preferred a Memorandum of Cross Objections to the extent the trial Court's decree was against him. By its judgment dated August 22, 1963, the High Court allowed the appeal, holding that the will, Ex. B-4 was executed by Veeriah in a sound and disposing state of mind and that the will was not only true but was valid and binding upon the plaintiff. The High Court accordingly dismissed the suit. The Memorandum of Cross Objections was also dismissed.

The first question to be considered in this appeal is whether the will, Ex. B-4 was true and genuine and was executed by Veeriah in a sound and disposing state of mind.

It is not disputed that one Gangiah died leaving his widow Rattamma and his only son through her called Veeriah and a young daughter. The girl died without leaving any issue in the year 1932. Veeriah was a little boy and it is not disputed that

A he was below average in intelligence and understanding. Rattamma alongwith her son took up residence with her brother, Defendant no. 1 who was a man of great wealth and influence in the village, owning fifty acres of land and outstanding credits to the extent of Rs. 20,000/-. Rattamma's husband had left properties to the extent of 13 acres of land. In spite of owning so much property B Veeriah was engaged as a cow-boy in tending cattle. In June 1939, he had an attack of typhoid, became bed-ridden and ultimately died of the disease on June 24, 1939. The case of the contesting defendants was that Veeriah executed the will, Ex. B-4 on June 17, 1939, that D.W. 4 wrote it and nine witnesses attested it but the will was not registered in Veeriah's life-time. On October 15, 1939, defendant no. 1 and Rattamma presented the will, C Ex. B-4 before the Sub-Registrar, Chirala for registration. The Sub-Registrar, however, refused to register the will by his order, Ex. A-45 in W.C. 4 of 1939. Defendant no. 1 preferred an appeal before the District Registrar, Guntur but the appeal was dismissed. Defendant no. 1 then filed O.S. no. 111 of 1940 in the court of District Munsif, Bapatla against Ramayya (father of de- D fendants 9 and 10), the plaintiff and Rattamma for a direction for registration of the will. The District Munsif returned the will to defendant no. 1 for want of pecuniary jurisdiction. Defendant no. 1 presented it to the Subordinate Judge, Bapatla and got it numbered as O.S. no. 6 of 1941. The suit was ultimately dismissed by the Subordinate Judge on the question of limitation. Defendant no. 1 and Rattamma filed O.S. no. 13 of 1942 in the Sub- E ordinate Judge's court, Bapatla for a declaration that the will was genuine and valid. Ramayya filed a written statement and the suit was ultimately decreed in favour of Defendant no. 1 and Rattamma. The present plaintiff, Gorantla Tathaiah was, however, not a party to that suit.

F In the will, Ex. B-4 it is stated by the testator as follows :

> "....Typhoid condition has set in. As no treatment has been effective in curing this condition I have lost confidence that I will survive. Therefore I have wholeheartedly made the following disposition regarding my movable and immovable properties in order that G there may be no obstruction in future from any source whatsoever.
>
> That my mother Rattamma should be maintained comfortably for her life-time and that in case there is disagreement between her and my material uncle. Venkatasubbayya and they decide to live separately, my H mother, Rattamma, should enjoy the income of the property mentioned in 'B' Schedule for her life-time without exercising any powers of disposition by way of gift, sale etc., over the property and that after her life-

time the entire property mentioned in 'B' schedule should devolve in my maternal uncle, Venkatasubbayya. My maternal uncle, Venkatasubbayya shall enjoy the entire properties mentioned in 'A' and 'B' Schedules with absolute powers of disposition by way of gift, sale etc."

In the will it is mentioned that Veeriah had sold his land on May 30, 1939 to defendant no. 4 and received an advance of Rs. 165/- with the stipulation that the balance of sale price should be paid at the time of registration. Veeriah also said that in case he did not live long enough, defendant no. 1 should complete the sale transaction and receive the balance of price from defendant no. 4. The will was written by one Ammanamanchi Sambiah, D.W. 4 the *karnam* of the village. There are 9 attesting witnesses of whom three are dead. On behalf of the plaintiff two of the attestors P.Ws. 8 and 9 were examined and two attesting witnesses were examined as Court witnesses 1 and 2. On behalf of defendants two attesting witnesses D.Ws. 1 and 6 besides the scribe D.W. 4 gave evidence. P.W. 8 deposed that the testator did not give any instructions or particulars for drafting the will. The testator was very weak and in a delirious state and he was not in a position to put his thumb impression to the will. P.W. 9 is stone-deaf and he could not give proper evidence. He did not remember if Veeriah was raving and was tearing his clothes. D.Ws. 1, 4, 6 and 14 and C.Ws. 1 and 2 say that the testator was in a sound and disposing state of mind. It was the testator who gave instructions regarding the disposition of the properties. D.W. 4 wrote the will and read it over to Veeriah who approved of it and put his thumb impression thereon. The evidence of P.Ws. 8 and 9 is therefore clearly in conflict with the evidence of C.Ws. 1 and 2 and D.Ws. 1, 4, 6 and 14. The evidence of C.Ws. 1 and 2 is interested. It is admitted that C.W. 1 is related to defendant no. 1 and C.W. 2 is indebted to the first defendant to the extent of Rs. 1,400/-. As regards D.Ws. 1, 4 and 6, the trial court has remarked that their testimony is not impartial and we see no reason to take a different view as regards the effect of their testimony. So far as D.W. 1 is concerned, he appears to have khatha dealings with the first defendant. D.W. 4 admitted that he and Venkataswamy were good friends and worked as *karnam* and Village Munsif for 30 years. There was a case of misappropriation against Venkataswamy and D.W. 4 deposed in his favour in that case. It is in evidence that D.W. 6 is related to Ambati Veeriah who is married to the first defendant's niece. With regard to P.Ws. 8 and 9 the High Court has remarked that they had attested the will without any protest or adding any note of protest though the testator, Veeriah was not in a sound state of mind at the time of the execution of the will. In our opinion, this circumstance is of no consequence and the High Court was not justified in reject-

A ing the evidence of P.Ws. 8 and 9 on this ground alone. On the other hand, there are two important features in the present case which throw a great deal of doubt as to whether the testator was in a sound and disposing state of mind at the time of the execution of the will. It is the admitted position that the first defendant took a prominent role at the time of the execution of the will by
B summoning the scribe and the attesting witnesses. It is stated by D.W. 1 that the first defendant also procured the writing materials and the black ink for affixing the thumb impressions of the witnesses. It is also admitted that the will preferred the first defendant to the mother. Normally, the testator would have bequeathed all his property to the mother and would have also given her power to adopt a boy to perpetuate the lineage of the family. Instead
C the mother was given, in the will, a life interest in items 1 and 6 and the rest of the properties were given absolutely to defendant no. 1. It is undisputed that the testator was 24 years of age at the time of the execution of the will and that he was far below the average level of intelligence and understanding and nobody was prepared to offer a girl in marriage to him. There is evidence
D that Veeriah was "lacking in wits" and that he was employed for tending cattle. Further more, the testator was suffering from typhoid fever at the time of the execution of the will and he died a week thereafter *i.e.*, on June 24, 1939. In Ex. B-4 it is recited that the testator was ailing for about 15 days and had become delirious. According to D.W. 4 when he arrived Veeriah was lying on a cot and he was not in a position to sit up by himself.
E Both D.Ws. 1 and 4 admit that the attesting witnesses and the scribe had all assembled and waited for nearly an hour. Both P.Ws. 8 and 9 say that at the time of the execution of the will Veeriah was in a delirious state. D.Ws. 1, 4, 6, 14 and C.W. 1 all admit that the testator was delirious on the day previous to the execution of the will and also subsequent to the day of the execu-
F tion of the will. These witnesses, however, state that the testator was quite all right and in normal condition on the date of the execution of the will. It is difficult to accept this part of the defence evidence. Considering that the condition of the testator became worse and he died a week thereafter it is difficult to accept the evidence of defence witnesses and of C.W. 1 that the testator was
G in a sound state of mind on the date of the execution of the will but he was in a delirious state the day before and the day after the execution of the will. In our opinion, the Subordinate Judge was right in his conclusion that the testator was physically weak and in a delirious mental state at the time of the execution of the will. We think the High Court had no justification for reversing
H the view taken by the Subordinate Judge on this point.

It is well-established that in a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who pro-

pound the will to remove that suspicion. What are suspicious circumstances must be judged in the facts and circumstances of each particular case.. If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner. It is observed in Williams on "Executors and Administrators", Vol. I, 13th Ed., p. 92 :

> "Although the rule of Roman Law that *'Qui se scripsit haeredem'* could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased."

According to the decision in *Fulton* v. *Andrew*(1), "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of *Barry* v. *Butlin*(2). The two rules of law set out by Baron Parke are : "first, that the *onus probandi* lies in every case upon the party propounding a 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"; "the second is, that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." In *Sarat Kumari Bibi* v. *Sakhi Chand & Ors.*,(3) the Judicial Committee made it clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the

(1) (1875) L.R. 7 H.L. 448. (2) (1838) 2 Moo. P.C. 480, 482.
(3) 56 I.A. 62.

A execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator." This view is supported by the following observations made by Lindley and
B Davey, L. JJ., in *Tyrrell* v. *Painton*(1):

> "The rule in *Barry* v. *Butlin* (2 Moo. P.C. 480); *Fulton* v. *Andrew* [(1875) L.R. 7 H.L. 448]; and *Brown* v. *Fisher* [(1890) 63 L.T. 465] is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large bene-
C fits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the con-
D tents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will." (Lindley, L.J.).

> "It must not be supposed the principle in *Barry* v.
E *Butlin* (2 Moo. P.C. 480) is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion; but the principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of
F the testator the Court ought not to pronounce in favour of it unless that suspicion is removed." (Davey, L.J.).

It is in the light of these principles that the evidence adduced in this case will have to be considered. As we have already pointed out, there is abundant testimony in this case which proves beyond doubt that the testator was physically in a weak condition and
G that he was in a delirious state of mind at the time of the execution of the will. It is admitted that the first defendant took a prominent part in summoning the attesting witnesses and the scribe and in procuring the writing materials for the execution of the will. There is also evidence that Veeriah lost his father, Gangiah when he was hardly 10 years of age and after Gangiah's death
H the first defendant brought Rattamma and Veeriah to his house and was looking after them. The first defendant had therefore considerable influence over Veeriah and his mother Rattamma.

(1) (1894) P. 151, 157, 159.

There is also the circumstance that Veeriah was only 24 years of age at the time of the execution of the will and he was slow witted and below the average level of intelligence and understanding. Having regard to the cumulative effect of all the circumstances we are of opinion that the will, Ex. B-4 was not executed by Veeriah in a sound and disposing state of mind, and was not legally valid and binding upon the plaintiff. We accordingly set aside the finding of the High Court on this issue.

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It is, however, not possible for us to finally dispose of this appeal because the High Court has not examined the second question arising in this case, namely, whether the Hindu Succession Act (Act XXX of 1956) is applicable to the case and whether defendant no. 1 was the nearest heir to succeed to the estate of the deceased Veeriah in preference to all others including the appellant, defendants 9 and 10. We therefore consider it necessary that the case should go back to the High Court for hearing the parties afresh and recording a finding on this question and to submit it to this Court within three months from the date of receipt of the record by the High Court. The parties will not be allowed to give additional evidence in the case and the High Court will submit a finding on the evidence already adduced by the parties. The appeal will be placed for further hearing before this Court after the finding is submitted by the High Court in accordance with the directions we have given.

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V.P.S. *Appeal remanded.*