ADIVEKKA AND ORS.

v.

HANAMAVVA KOM VENKATESH 'D' BY LRS. AND ANR.

MAY 9, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Will—Execution of—Testator executing Will in favour of his niece—Allegation of suspicious circumstances—Sustainability of Will—Held: Testator's wife and children unaware of the execution of the Will—Beneficiary too unaware and did not know from where and how she obtained possession of the Will—Beneficiary not examining herself which leads to drawal of adverse inference against her—Also registration of Will before Sub-Registrar doubtful—Disposition made in Will unfair, unnatural and improbable as no sane person for very cogent reasons would disinherit his children—Thus, Will not genuine—Order of High Court upholding the execution of Will set aside.

There was a land in the name of H. It is alleged that H executed Will in favour of respondent no. 1-his niece and bequeathed the land in her favour just two weeks prior to his death. Appellants-wife and children of H were unaware of the execution of the Will. They applied for mutation of their names after death of H. Respondent No. 1 filed objections and in the meantime, allegedly sold the suit lands in favour of respondent no.2-her husband. Appellants filed a suit for declaration and permanent injunction since H purchased the land by sale of family gold and as such was a joint family property; and that the Will was a fabricated document. Respondent No. 1 did not examine herself. She examined her husband in whose favour she had allegedly executed a Power of Attorney. A purported attesting witness and the Sub-Registrar who registered the document were also examined. Trial Judge decreed the suit. High Court set aside the judgment and decree holding that the execution of the Will has been proved by the attesting witness and the Sub Registrar. Hence the present appeal.

Appellants contended that the High Court did not address itself on the question in regard to a large number of suspicious circumstances which would clearly go to show that the Will is not a genuine one.

Respondents contended that the very purpose for which the Will was

executed as also the proof of execution thereof by H categorically dispels the alleged suspicious circumstances. A

Allowing the appeals, the Court

HELD: 1.1. The High Court was not correct in setting aside the judgment of the Trial Judge that execution of Will has not been proved. B
[Para 20] [275-A]

2.1. The subject matter of the Will was a piece of agricultural land. That was the only agricultural land in possession of the testator. He was although owner of four houses, according to the appellants, the same had not been generating any income. Admittedly, the appellants, other than son of H C were residing with him. Therefore, it is difficult to believe that respondent no. 1 had been looking after him or despite her marriage with respondent no. 2, she had been residing in his house. [Para 14] [270-F, G]

2.2. It may or may not be true that testator's son B had been residing D separately, but evidently he had been able to perform the marriage of only one of his daughters and, thus, six other daughters were yet to be married. Assuming that respondent No. 1 was brought up by him, she was married. Her husband was affluent. He could afford to purchase the property in question. Thus, there was apparent reason to execute a Will in her favour depriving his wife and children. [Para 14] [270-H; 271-A] E

2.3. There is no explanation as to why a Will had to be executed and registered without the knowledge of his wife by H. There is nothing on record to show that the testator had any special love or affection for respondent no. 1. Respondent No. 1 did not examine herself. According to her, she was not even aware of the execution of the Will. She came to know the same at a much F later stage, i.e., after lapse of 10-12 months. How and on what basis she obtained the possession of the original Will is not known. On what basis the Sub-Registrar handed over possession of the Will to husband of Respondent No. 1 has not been disclosed. Had she examined herself, she could have been accosted with the said question. It could have been shown that H did not have G any love and affection for her. Non-examination of the party to the lis would lead to drawal of an adverse inference against her. [Para 15] [271-B, C, D]

Sardar Gurbakhsh Singh v. *Gurdial Singh and Anr.*, AIR (1927) PC 230, *Martand Pandharinath* v. *Radhabai*, AIR (1931) Bom 97; *Tulsi and Ors.* v. *Chandrika Prasad and Ors.*, [2006] 8 SCC 322 and *Binapani Paul* v. *Pratima* H

A *Ghosh and Ors.,* (2007) 6 SCALE 398, relied on.

2.4. Grave suspicion in regard to the execution of the Will arises as husband of respondent No. 1 being her power of attorney holder spoke of an agreement for sale. According to him, out of a total consideration of Rs. 58,000/- or Rs. 50,000/- as the case may be, a sum of Rs. 49,000 had already B been paid. If that be so, in ordinary course, he would have tendered the balance amount. He could have filed a suit for specific performance. At least a notice in that behalf could have been served. Therefore, husband of respondent No. 1, admittedly had an eye over the property. Why only the agricultural land possessed by H would be the subject matter of the Will, thus, has not been C proved. Admittedly he had been suffering from cancer. He died only two weeks after the execution of the Will. [Para 16] [271-E, F, G]

2.5. Submission of respondent no, 1 that they were in possession of the land in question, cultivated the same for one year and thereafter sold the same, *ex-facie* does not appear to be correct as the lands had been sold by her on D 16.3.1989 whereas the testator died on 11.9.1988, i.e., within a period of six months from the date of execution of the Will. [Para 16] [271-G; 272-A]

2.6. The disposition made in the Will is unfair, unnatural and improbable as no sane person, save and except for very cogent reasons, would disinherit his minor children. [Para 17] [272-A]

E

2.7. According to attesting witness he went with the testator at about 4.30 p.m. on 25.8.1998 to Taluk Office. The Will is said to have been first scribed by bond writer. The same thereafter was typed out by another typist. It was brought back to the same bond writer. He had allegedly read over the contents of the Will whereafter only H signed and thereafter the witnesses F put their signatures. The entire process must have taken about two hours. How the Will could be registered on the same day, i.e., beyond the office hours is again a matter which is beyond anybody's comprehension. Sub-Registrar did not say that the Will was executed and registered before him.

[Para 17] [272-B, C]

G

Rabindra Nath Mukherjee and Anr. v. *Panchanan Banerjee (Dead) by LRs. And Ors.,* [1995] 4 SCC 459; *B. Venkatamuni* v. *C.J. Ayodhya Ram Singh and Ors.,* (2006) 11 SCALE 148; *Niranjan Umeshchandra Joshi* v. *Mrudula Jyoti Rao and Ors.,* (2006) 14 SCALE 186 and *Joseph Antony Lazarus (Dead) By LRs.* v. *A.J. Francis,* [2006] 9 SCC 515, referred to.

H

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7400-7401 of 2000. A

From the Final Judgment and Order dated 27.08.1998 of the High Court of Karnataka at Bangalore in RFA Nos. 306 and 331 of 1994.

Shankar Divate for the Appellants. B

Rajesh Mahale for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Requirements in regard to the nature of proof of a Will in view of existing suspicious circumstances is the question involved in this appeal which arises from the judgment and order dated 27.08.1998 passed by the High Court of Karnataka at Bangalore in R.F.A. Nos. 308/94 and 331/94. C

2. Before, however, we embark upon the said question, we may notice the admitted facts. D

3. Appellants herein are wife and children of one Hanumanthappa, the testator. The suit property measuring 4 acres 32 guntas stood in his name. He admittedly was suffering from cancer. He expired on 11.09.1988. Just two weeks prior to his death, viz., 25.08.1988, he allegedly executed the Will in favour of Respondent No. 1 herein bequeathing in her favour the lands in question. Appellants were not aware of the execution of the said Will. They applied for mutation of their names after the death of Hanumanthappa. An objection thereto was raised by Respondent No. 1. Allegedly, in the meantime, Respondent No. 1 had also sold the suit lands in favour of Respondent No. 2 by a deed of sale dated 16.03.1989. E F

4. On the aforementioned premise, the appellants filed a suit for declaration and permanent injunction alleging that the land in question was purchased by Hanumanthappa by sale of family gold and, thus, was a joint family property. It was also alleged that the Will in question was a fabricated document. G

5. Respondents in their written statements, however, averred that the Will was a genuine document.

6. One of the issues which were framed by the learned Trial Judge H

A related to the execution of the Will. It reads as under:

> "(4) Whether the defendant No. 1 proves that she has become full owner of the suit property on the basis of the Will dated 25.8.88 legally executed by the deceased Hanumanthappa?"

B 7. Defendant Respondent No. 1 herein did not examine herself. She examined her husband in whose favour she had allegedly executed a Power of Attorney. A purported attesting witness and the Sub-Registrar who registered the document were also examined.

8. In her evidence, PW-1 (wife of Hanumanthappa) stated:

C

(i) The testator was suffering from throat cancer and he was not having any thinking capacity.

(ii) The testator had not executed any Will in favour of Defendant No. 1.

D (iii) Defendant No. 1 had never stayed with her husband in their house.

(iv) Her husband had other properties apart from the suit lands but the same were not fetching any income.

E Husband of Respondent No. 1 (DW-1) and the Power of Attorney holder, however, in his evidence, stated:

(i) Defendant No. 1 is the daughter of Huchhappa who was brother of her father in law Hanumanthappa. When Huchhappa married for the second time, Defendant No. 1 being a child, was looked after and brought up by Hanumanthappa.

F

(ii) Defendant No. 1 lived in the house of Hanumanthappa for about 12-13 years. After her marriage, she came to his house.

(iii) On 8.04.1982, Hanumanthappa agreed to sell the suit lands to him for a sum of Rs. 52,000/- and he had paid a sum of Rs.49,000/- by way of advance.

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(iv) Hanumanthappa was suffering from cancer on the left side of the neck, but even at that time he had good level of understanding.

(v) Hanumanthappa took treatments for about 8 months whereafter only he came to know that he had been suffering from cancer.

H

(vi) After the death of Hanumanthappa, he learnt of the Will from one Bhimappa Banglore Nagappa Yallappa Gokabi. He was told that it had been registered in the Sub-Registrar's Office. He and his wife, thus, went to Sub-Registrar's office and collected the Will. A

(vii) As per the Will, the name of the Defendant No. 1 was mutated on the basis of the sale deed. He cultivated the lands for one year and thereafter sold the same to Respondent No. 2. B

The said witness, however, also made out an alternative case. According to him, on or about 24.08.1971, an agreement to purchase the suit land was executed in the name of Hanumanthappa for a consideration of Rs. 11,000/- and a sum of Rs. 5000/- was paid by him by way of advance. C

In his cross-examination, however, he stated that Hanumanthappa demanded a sum of Rs. 58,000/- and he was ready to pay Rs. 50,000/-.

No document, however, to show that a sum of Rs. 49,000/- was paid to Hanumanthappa, was brought on record. D

9. The attesting witness Sunkappa (DW-4) sought to prove the execution of the Will. He had allegedly come to see Hanumanthappa two weeks prior thereto. Even at that point of time, although the appellants were present, no discussions on the subject of execution of Will took place. Who had asked him to go to the registration office for attestation of the Will is not known. E

The Sub-Registrar who examined himself as DW-5, in his evidence, did not state that the contents of the Will were read over and explained to Hanumanthappa.

10. The learned Trial Judge decreed the suit. The High Court, however, by reason of the impugned judgment reversed the said judgment and decree opining that the execution of the Will has been proved by DWs 4 and 5. F

11. Mr. Shankar Divate, learned counsel appearing on behalf of the appellants, in support of this appeal, would submit that the High Court did not address itself on the question in regard to a large number of suspicious circumstances which would clearly go to show that the Will is not a genuine one. G

12. Mr. Rajesh Mahale, learned counsel appearing on behalf of the respondents, on the other hand, would submit that the very purpose for H

A which the Will was executed as also the proof of execution thereof by Hanumanthappa categorically dispels the alleged suspicious circumstances.

13. Recitals made in the Will are as under:

> "You are my elder brother's daughter since your childhood I have looked after you till your majority. After your majority you have looked after me and my children and living with me. I trust you that you will look after me even after my demise. I have a special love for you.
>
> My son Bhimappa is living separately and is not helping me in any way. I have married a girl. I have left other properties for my minor children and they will look after it.
>
> For the above stated lands my children do not have any right and I wish that after me the aforesaid land should go to you hence this Will. I declare you the complete owner of the aforesaid land after my death. During my life time I will use the land as per my wish and enjoy the same. After my death as a owner you can have the possession of the aforesaid land and enjoy the same for generation to generation.
>
> After my death except you none have any right or ownership right in the aforesaid land. After my death you are the complete owner and right holder of the aforesaid land. (In the fourth line I have been scored of)
>
> I have not mortgaged or executed any agreement or I have not given possession of the suit lands to anybody. It has not been attached by any court order or tendered as security. Hence this will be executed with own will and wish."

14. The subject matter of the Will was a piece of agricultural land measuring 4 acres 32 guntas. That was the only agricultural land in possession of the testator. He was although owner of four houses, according to the appellants, the same had not been generating any income. Admittedly, the appellants, other than son of Hanumanthappa, were residing with him. It is, therefore, difficult to believe that the defendant respondent No. 1 had been looking after him or despite her marriage with DW-1, she had been residing in his house.

It may or may not be true that his son Bhimappa had been residing

separately, but evidently he had been able to perform the marriage of only one of his daughters and, thus, six other daughters were yet to be married. Assuming that Respondent No. 1 was brought up by him, she was married. Her husband was affluent. He could afford to purchase the property in question. There was, thus, no apparent reason to execute a Will in her favour depriving his wife and children.

15. Why a Will had to be executed and registered without the knowledge of his wife by Hanumanthappa has not been explained. There is nothing on record to show that the testator had any special love or affection for Respondent No. 1. Respondent No. 1 did not examine herself. According to her, she was not even aware of the execution of the Will. She came to know the same at a much later stage, i.e., after lapse of 10-12 months. How and on what basis she obtained the possession of the original Will is not known. On what basis the Sub-Registrar handed over possession of the Will to DW-1 has not been disclosed. Had she examined herself, she could have been accosted with the said question. It could have been shown that Hanumanthappa did not have any love and affection for her. Non-examination of the party to the lis would lead to drawal of an adverse inference against her. [See *Sardar Gurbakhsh Singh* v. *Gurdial Singh and Anr.*, AIR (1927) PC 230, *Martand Pandharinath* v. *Radhabai*, AIR (1931) Bom 97, *Sri Sudhir Ranjan Paul* v. *Sri Chhatter Singh Baid & Anr.*, *Tulsi and Ors.* v. *Chandrika Prasad and Ors.*, [2006] 8 SCC 322 and *Binapani Paul* v. *Pratima Ghosh & Ors.*, (2007) 6 SCALE 398]

16. Grave suspicion in regard to the execution of the Will arises as husband of Respondent No. 1 being her power of attorney holder spoke of an agreement for sale. According to him, out of a total consideration of Rs. 58,000/- or Rs. 50,000/-, as the case may be, a sum of Rs. 49,000/- had already been paid. If that be so, in ordinary course, he would have tendered the balance amount. He could have filed a suit for specific performance. At least a notice in that behalf could have been served. Husband of Respondent No. 1, therefore, admittedly had an eye over the property. Why only the agricultural land possessed by Hanumanthappa would be the subject matter of the Will, thus, in our opinion, has not been proved. Admittedly he had been suffering from cancer. He died only two weeks after the execution of the Will.

Contention of DW-1 that they were in possession of the land in question, cultivated the same for one year and thereafter sold the same, ex facie does not appear to be correct as the lands had been sold by her on 16.03.1989

A whereas the testator died on 11.09.1988, i.e., within a period of six months from the date of execution of the Will.

17. The disposition made in the Will is unfair, unnatural and improbable as no sane person, save and except for very cogent reasons, would disinherit his minor children. DW-1 does not state as to from where and how she B obtained possession of the original Will.

According to DW-4, he went with the testator at about 4.30 p.m. on 25.08.1998 to Taluk Office. The Will is said to have been first scribed by one bond writer. The same thereafter was typed out by another typist. It was brought back to the same bond writer. He had allegedly read over the C contents of the Will whereafter only Hanumanthappa signed and thereafter the witnesses put their signatures. The entire process must have taken about two hours. How the Will could be registered on the same day, i.e., beyond the office hours is again a matter which is beyond anybody's comprehension. DW-5 did not say that the Will was executed and registered before him.

D

In *Rabindra Nath Mukherjee and Anr.* v. *Panchanan Banerjee (Dead) By LRs. And Ors.*, [1995] 4 SCC 459, wherein reliance has been placed by Mr. Mahale, the circumstances preceding the execution of the Will were taken into consideration. This Court in the factual matrix obtaining therein opined:

E "8. If a total view is taken of the aforesaid circumstances, which has to be the approach, we are of the opinion that the courts below overplayed some circumstances which they regarded as suspicious and somehow missed some circumstances which bolstered the case of the propounders."

F 18. We may, however, notice that in *B. Venkatamuni* v. *C.J. Ayodhya Ram Singh & Ors.*, (2006) 11 SCALE 148, this Court upon considering a large number of decisions opined that proof of execution of Will shall strictly be in terms of Section 63 of the Indian Succession Act. It was furthermore held:

G "It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed:

H "Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document required by law

to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence." A

It was emphasised that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence stating: B

"However, having regard to the fact that the Will was registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such *prima facie* case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not know well the contents of the Will and in sound disposing capacity executed the same. C

Each case, however, must be determined in the fact situation obtaining therein. D

The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance. E

The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the records. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said court. It applied a wrong legal test and thus, came to an erroneous decision." F

19. Yet again in *Niranjan Umeshchandra Joshi* v. *Mrudula Jyoti Rao & Ors.*, (2006) (14) SCALE 186, this Court held:

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"Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the H

A court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must B be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi,* on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the Will has been validly executed and C is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus D would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden E would be on the caveator. [See *Madhukar D. Shende* v. *Tarabai Shedage,* [2002] 2 SCC 85 and *Sridevi & Ors.* v. *Jayaraja Shetty & Ors.*, [2005] 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

Noticing *B. Venkatamuni* (supra), it was observed:

F "The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

We may, however, hasten to add that there exists a distinction G where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances H of grave suspicion. [See *Venkatachala Iyengar* (supra)]"

[See also *Joseph Antony Lazarus (Dead) By LRs.* v. *A.J. Francis,* [2006] 9 SCC 515] A

20. We are, therefore, of the considered view that the High Court was not correct in reversing the judgment of the learned Trial Judge.

21. For the reasons aforementioned, the judgment of the High Court is set aside and that of the Trial Court is restored. The appeals are allowed. No costs. B

N.J. Appeals allowed.