

(2012) 09 KAR CK 0160

In the Karnataka High Court

Case No : Regular First Appeal No. 129 of 2010

M. Narayanappa Since dead by his LR's Sundar Raj, Smt. N. APPELLANT
Bharathi and Smt. Indira Murthy

Vs

Sri. M. Srinivasa Naidu and Narayanaswamy RESPONDENT

Date of Decision : 05-09-2012

Acts Referred:

Evidence Act, 1872 — Section 60, 68
Succession Act, 1925 — Section 63, 63 (C)

Citation : (2012) 09 KAR CK 0160

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : A. Sampath, for Sri. R. Nataraj, for the Appellant; V. Ramesh Babu for M/s Chalapathi and Srinivas and Sri. H.N. Sunil Kumar for C/R1-2, for the Respondent

Final Decision : Allowed

Judgement

A.S. Bopanna

1. The appellants herein are the defendants No. 1 to 3 in O.S. No. 4030/1989. The suit was filed by the plaintiffs seeking that they be declared as Trustees and be directed to account for all the rents and profits accruing from the schedule properties as Trustees in execution of the Trust and the accounts be received by the Court or alternatively the Trust estate be administered by the Court for the benefit of the Trust and the defendants who are claiming to be interested in the schedule properties. The Court below after considering the rival contentions has decreed the suit by its judgment and decree dated 07.11.2009. The defendants No. 1, 2 and 3 are therefore assailing the said judgment. The parties would be referred to in the same rank as assigned to them before the Court below for the purpose of convenience and clarity.

2. The case of the plaintiffs is that one late M. Venkatswamy out of his own acquisition and inheritance to the estate of his wife Smt. Salamma had become

the absolute owner of the immovable properties No. 24/1, II Main Road, Okalipuram, Srirampuram, Bangalore known as Venkaswamy Salamma Kalyana Mantapa and No. 24/2 situated therein. The properties are described in schedule "A" "B" and "C" to the plaint. Further the said late Venkataswamy was also exercising lease-hold rights in the property No. 13, Ekambara Sahoji Trust which is described in Schedule-D to the plaint. The said late M. Venkataswamy is stated to have left a WILL and Testament dated 22.09.1983 Under the WILL, the plaintiffs have been appointed as the Trustees. The WILL is stated to have been drawn up in accordance with law. The first plaintiff is the Managing Trustee and second plaintiff is one of the Trustees indicated under the WILL and they are empowered to administer the schedule properties for charitable purposes.

3. The plaintiff contends that the first defendant calling himself as the successor in interest to late M. Venkatswamy had instituted Rent Control Proceedings for recovery of rent from the tenanted properties belonging to the estate of late M. Venkatswamy. The plaintiffs have also made further allegations against the first defendant about the manner in which he is misutilizing the properties. The plaintiffs who claim to have been made as the Trustees by late M. Venkatswamy for proper and effective management have sought for the relief prayed in the suit.

4. The first defendant has filed the written statement and has disputed the case put forth by the plaintiff. It is contended that the suit schedule "A" property was acquired by late M. Venkatswamy through a registered WILL dated 27.02.1965 executed by his wife Smt. Salamma. The schedule "B" property is self-acquired is not disputed. However, the contentions are raised with regard to mis-description of the property. Reference is made to a suit filed by the first defendant in O.S. No. 4156/ 1987 for injunction in respect of the "A" and "3" schedule properties. The grant of ex-parte temporary injunction is also averred. The defendant has contended that he is exercising absolute right over the suit "A" and "B" schedule properties as the owner and he is the only legal heir left behind by late M. Venkatswamy as he is his brother and he did not have any issues. Insofar as the leasehold rights in respect of the "C" schedule property, it is admitted. The WILL stated to have been executed by late M. Venkatswamy creating a Trust is disputed and it is contended that the WILL propounded by the plaintiffs is fabricated and concocted and as such the same does not bind the defendant. It is alleged that the WILL is set up by the plaintiffs to make unlawful gain for themselves and to defeat the claim of the first defendant. The contents of the WILL is also disputed. Since the first defendant is exercising ownership rights over the property, the rent control proceedings were very much necessary and in such proceedings, the claim of the plaintiffs have been rejected. The first defendant on reiterating that no WILL has been executed by late M. Venkatswamy has sought for dismissal of the suit.

5. The first defendant having died, the legal representatives were brought on record who have also filed the written statement wherein the fact of the suit in O.S. No. 4156/1987 being decreed on 20.08.1997 is stated. The legal

representatives of the first defendant have claimed that after the death of the first defendant they have been exercising ownership rights over the suit "A" and "B" schedule properties. Hence they have also sought for dismissal of the suit.

6. The Court below on taking note of the rival contentions has framed as many as 6 issues for its consideration which read as hereunder:

1. Whether the plaintiffs prove that Court-fee paid is sufficient?
2. Whether the plaintiff prove the correctness of the descriptions of the suit schedules "A", B" and "D" properties?
3. Whether the plaintiff prove that late M. Venkataswamy has left a will dated 22.09.1983 under which the 1st plaintiff is appointing as managing trustees and 2nd plaintiff as one of the trustees to administer suit properties as trust properties for charitable purposes?
4. Whether the plaintiffs prove cause of action for the suit?
5. Whether the plaintiffs prove that they are entitled to declaration sought? So also, for other reliefs claimed?
6. To what reliefs, the parties are entitled?

7. In order to discharge the burden cast on the parties, the second plaintiff has examined himself as PW. 1 and relied upon documents at Ex. P1 to P8. One Sri S. Krishnappa, stated to be a witness to the WILL was examined as PW. 2. The first defendant was examined as DW. 1 and one Sri C.M. Kamaluddin, was examined as DW. 2 and the documents at Ex. D1 and D2 were relied upon. The Court below on analysing the evidence has decreed the suit on 07.11.2009.

8. Sri A Sampath, Learned Counsel for the defendant while assailing the Judgment of the Court below would contend that the principles of proof of WILL has not been properly considered. The plaintiffs who are strangers, in the guise of seeking that they be appointed as Trustees are attempting to knock off the valuable property. The purpose of the Trust is not forthcoming. The original defendant is the brother of the deceased Venkataswamy. Since he had died issueless, the defendant being Class II heir was entitled to succeed. The plaintiffs on the other hand in order to deny such right and to make gain, have concocted and fabricated the WILL. The Learned Counsel has referred to the suit in OS No. 95/80 filed by late Venkataswamy for recovery of money and the role of the first plaintiff herein being examined as witness therein and similarly, the alleged witnesses of the WILL being examined as witness therein is pointed out. Further, in the alleged WILL, there is reference to entitlement of money to first plaintiff which makes the same doubtful and being fabricated for their benefit. The WILL has neither been proved by identifying and marking the signature nor is it in accordance with Section 63(C) of the Indian Succession Act. The witnesses examined have not spoken about the execution and as such the Propounder of the WILL has failed to prove the WILL. Even otherwise, the WILL has not been

given effect and as such the relief claimed could not have been granted by decreeing the suit. Hence, he contends that the appeal be allowed and the Judgment and decree be set aside.

9. Sri. V. Raikmesh Babu, Learned Counsel for the plaintiff however seeks to sustain the Judgment of the Court below. The plaintiffs are the executors to carry out the desire of the Testator. One of the plaintiffs is also the relative being his sister's son. The WILL is being denied for the sake of denial. The state of mind and health of the Testator has not been denied. Only contention is that the WILL is concocted and fabricated. The original of the WILL was produced in the earlier suit, which was lost in the Court. Hence, the copy of the WILL in the form of secondary evidence was produced and as such, it was marked and the evidence is given to the effect that they were simultaneously present and executed. The plaintiffs are not personally interested but are only Trustees. The presence of the witness at the time of the WILL is not disputed. Sri P.S. Goud was his Auditor. Therefore, he has drafted but he is not beneficiary. The fact that the Testator was residing with a helper shows that the defendant has not looked after his brother and he was only interested in succeeding to his properties. He was issueless and as such, desire was for charitable purpose. The examination of the witnesses in the earlier suit as contended cannot be of any avail. In the said proceedings, they were natural witnesses, as Sri P.S. Goud was the auditor of late Venkatswamy and he was necessary to be examined. The other witnesses are also persons known to Venkatswamy and it is such known persons who would normally be the witnesses to the WILL as they are the confidants. In any event, they are not the beneficiaries under the WILL. Even the plaintiffs also have been made the Trustees and the WILL also provides for co-opting other Trustees which can even be the defendant himself. Mere mention of money transaction in the WILL does not take away the sanctity inasmuch as the money was due and the Testator has made a proviso to pay what was outstanding. Hence, these aspects cannot be construed as suspicious circumstance. Therefore the Court below on taking note of the instant facts was justified in decreeing the suit.

10. In the light of the above contentions the following points arise for consideration:

- i) Whether the WILL based on which the declaration has been sought is proved and in that context, whether the Court below was justified in decreeing the suit ?
- ii) Whether the examination of the witness and the scribe of the WILL in question in an earlier suit and mentioning of certain monetary transaction constitute suspicious circumstance in the instant case?
- iii) Does the judgment and decree passed by the Court below call for interference ?

11. The prayer made in the suit for declaring the plaintiffs as Trustees or for the grant of the alternate prayer made therein is based on the WILL dated 22.09.1983 claimed to have been left behind by late M. Venkataswamy who is

the brother of the original first defendant who died during the pendency of the suit and are now represented by his legal representatives. Hence, the plaintiffs in order to succeed in their suit would have to prove the execution of the WILL by late M. Venkataswamy in accordance with law. If the execution of the WILL is proved, they have to thereafter remove the suspicions circumstances alleged by the defendant, if it is really found to be suspicious circumstance.

12. At the outset, it is to be noticed that the original of the WILL dated 22.09.1983 is not available in the instant case. Hence, a photocopy of the WILL has been marked as Ex. P4. The marking had been objected and as such it was marked "subject to objection". The plaintiffs in order to prove the said WILL as secondary evidence have relied on the evidence recorded in O.S. No. 95/1980 wherein the first plaintiff was examined on 20.01.1989. In the said proceedings, the WILL in question had been marked as Ex. P1, which is referred to in the said deposition. The endorsement made on the certified copy of Ex. P3 that the document at Ex. P1 is not forthcoming with the records is referred to indicate that the WILL which had been marked in the proceedings had been misplaced in the Court records itself and therefore not available. The certified copy of the order passed in CRP Nos. 1603-1608/1988 disposed of on 06.06.1988 is relied on to indicate that in the said proceedings also there was reference to the WILL dated 22.09.1983. In that context, it is contended by the Learned Counsel for the plaintiff that the photocopy of the WILL produced in the said circumstances could be relied on as secondary evidence. The decisions in the case of Mst. Bibi Aisha and Others Vs. The Bihar Subai Sunni Majlis Avaqaf and Others, and in the case of Om Prakash Vs. State, are relied on for the said proposition of law.

13. The legal position that a document could be proved as secondary evidence if the circumstances thereto is made out, is the well established position of law. If that aspect of the matter is kept in view, in the instant case, the circumstances pointed out by relying on Exhs. P1 to P3 would disclose that a WILL dated 22.09.1983 had been relied on in the earlier proceedings. However, what cannot be in dispute is that the said document had been relied on for the limited purpose in those proceedings and the proof of the WILL has been left open, more particularly as seen from the observation in the operative portion of the judgment dated 25.07.2002 which is at Ex. P5 to obtain probate of the same. The probate proceedings stated therein is for the purpose of proof of the WILL. But, the reference made therein is to the WILL dated 19.11.1986. It is no doubt true that the WILL which is sought to be relied on in the instant proceedings has not been probated, but the instant suit has been filed claiming right under the said WILL. In any event, the maintainability of the suit on that aspect would not arise for consideration at this stage, inasmuch as the said aspect was considered by the Court below at an earlier point by the order dated 15.03.1990 which is available at Ex. P7 and the same has attained finality. Hence, the photocopy of the WILL which is marked as Ex. P4 though could be taken as secondary evidence, the same would have to be proved in accordance with law, if the plaintiffs are to be granted the relief prayed for in the instant suit.

14. In that view, the defence put forth by the defendants would indicate that they have seriously disputed the claim of the plaintiff that late M. Venkatswamy has left a WILL creating the Trust as claimed and it is contended that the WILL propounded by the plaintiff is fabricated, concocted and is not binding on the defendants. The defendants have asserted that late M. Venkatswamy died intestate and that he has not left any WILL and that the alleged WILL is set up by the plaintiffs to make unlawful gain for themselves. It is in that context, the burden is heavy on the plaintiffs as per issue No. 3 which had been framed by the Court below. The second plaintiff has been examined as PW. 1, who has reiterated the averments which have been made in the plaint by way of evidence tendered through affidavit and he has also filed an additional affidavit with regard to the original of the WILL being lost in the earlier Court proceedings. Insofar as that aspect of the matter, it is already concluded that the document can be received as secondary evidence subject to its proof. Insofar as the proof of the WILL the evidence of the said witness (PW. 1) could not be of relevance except for contending with regard to the nature of the WILL and the intention of the Testator which has been stated by him being a Propounder of the WILL.

15. In order to prove the execution of the WILL, the plaintiffs have examined Sri S. Krishnappa (PW. 2) who is cited as one of the witnesses to the WILL at Ex. P4. He has stated with regard to the sequence relating to the event when the WILL is said to have been executed by late Venkatswamy. PW. 2 is stated to have accompanied Sri P.S. Goud i.e., the other witness as also the scribe of the WILL in question, to the house of late M. Venkatswamy. The said Sri P.S. Goud is stated to have read out and translated the WILL in Kannada while informing the contents. Late Venkatswamy is stated to have said that the WILL is as per his instructions. The witness states that the Testator thereafter signed the WILL on all the pages and subsequent thereto, Sri P.S. Goud and PW. 2 put their signature. He also states that the Testator was in good health and sound state of mind. The said witness has been cross-examined in detail. He states that the Testator was known to him for about 5 years and he had known him through Sri P.S. Goud but, he did not know about his personal details. He also states that he does not know the nature of ill-health of the Testator and as to whether he was unable to move with the assistance of the helper. The witness states that when he had visited, he got down from the cot and sat on the Chair and spoke to them. Though in the affidavit evidence he has stated that he had signed the WILL as witness as required by late Venkatswamy, in the cross examination he states that Sri P.S. Goud asked him to sign the WILL as witness and he did not inquire from Venkatswamy about the condition of his health. It is no doubt true that certain other suggestions with regard to the WILL not having been executed by the Testator have been denied by the said witness. The other witness to the WILL i.e., Sri P.S. Goud is stated to be dead and was not available to be examined.

16. Hence, the sole witness examined to prove the WILL is the said PW. 2. Though he has stated in his evidence in chief that the Testator signed and

thereafter simultaneously the witnesses also signed, the same is in the nature of the pre-drafted affidavit and in that context, the admission in the cross examination that he had signed at the behest of P.S. Goud is to be kept in perspective. In that context, the cross-examination would disclose that PW. 2 did not know much about late Venkatswamy. This becomes more relevant in the context, as to whether he would have been able to identify the signature of late Venkatswamy. If this aspect is kept in view, PW. 2 has in fact not identified and marked the signature of the Testator or the witnesses to the WILL which includes the signatures of PW-2 himself. The Learned Counsel for the defendants has relied on the decision of the Hon"ble Supreme Court in the case of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, and the decisions of this Court in the case of V.M. Neelakantaiah and Another -vs- State of Karnataka by Chief Secretary & Others (ILR 2006 Karn 4213); in the case of Parappa & Others -vs- Bhimappa and Another (ILR 2008 Karn 1840) and in the case of Smt. Giddamma and another vs. Smt. Venkatamma (Dead by LRS) and others (ILR 2009 Kar 992) regarding proof of WILL and the requirement thereto. The sum and substance of all the above decisions is with regard to the requirement of a document as contemplated u/s 63 of the Indian Succession Act and the manner of proving the same as contemplated u/s 68 of the Evidence Act which requires atleast one witness to be examined. In the case on hand, the WILL which is marked at Ex. P4 no doubt indicates a signature at the place where the Testator would normally affix the signature and the signatures of two persons are seen at the place where the" witnesses are to sign. Hence, insofar as the requirement u/s 63 of the Indian Succession Act to consider a document to be a WILL, the same stands satisfied but, the question is whether such document has in fact been proved to be the WILL of late Venkatswamy.

17. In that regard, in the decision in the case of Janki Narayan Bhoir (supra), the Hon"ble Supreme Court has held that Section 68 of the Evidence Act gives a concession to examine only one witness though it is a requirement that the WILL be attested by two witnesses. It has been further held that it is significant that the one attesting witness being examined should be in a position to prove the execution of the WILL. Further in the very decision relied upon by the Learned Counsel for the plaintiff on the question of onus regarding suspicious circumstance, in the case of Daulat Ram and Others Vs. Sodha and Others, , the Hon"ble Supreme Court has held that in order to assess as to whether the WILL has been validly executed and is a genuine document, the Propounder has to show that the WILL was signed by the Testator and that he had put his signatures to the Testament on his own free will. The decision in Balathandayutham and Another Vs. Ezhilarasan, also refers to the nature of proof of the WILL.

18. If the above position of law is kept in perspective, as already noticed, one of the witnesses to the WILL has been examined as PW. 2 and his affidavit evidence has been filed in the manner stated above. What is significant to be noticed is that the WILL has not been marked through that witness (PW. 2). The WILL has

been marked through PW. 1 on 12.01.2007 and PW-1 is the second plaintiff, and is one of the Trustees as stated in the WILL. The witness - PW. 2 though in his affidavit evidence has stated with regard to the WILL being executed by the Testator and being attested by the witnesses including himself has not identified the WILL which has been marked. He does not state that the WILL which is on record is the one he is referring to. He does not even state the date of the WILL in his evidence but, vaguely states that in September 1983, late Venkatswamy had asked him to go to his house along with Sri P.S. Goud, while in the cross examination, he states that Sri P.S. Goud had taken him to the house of late Venkatswamy. Be that as it may, what is important is that the witness who was examined as one of the witnesses to the WILL as required u/s 68 of the Evidence Act has not even identified the WILL to say if it was the same document to which the other witness and late Venkatswamy himself had affixed the signature. When this has not been done, the signatures have also not been identified. In a circumstance, where the defendants had alleged that the WILL was concocted, fabricated and had not been executed by late Venkatswamy, the evidence of PW. 2 was very much relevant in that regard to establish that the document in fact had been executed by late Venkatswamy. Hence the mere statement in the affidavit evidence without reference to the document cannot be considered as proof of the document. The law is too well settled that the mere marking of a document does not amount to proof but, the contents should be proved as required in law.

19. The Learned Counsel for the plaintiff sought to explain the non-marking of the signatures since it was a secondary document and not the original. Reference was made to Section 60 of the Evidence Act to contend that the provision requires oral evidence to be direct. The said contention in my opinion needs to be brushed aside as irrelevant. The said provision refers to oral evidence, while what we are concerned with is the proof of the document. Though the document is relied on as secondary evidence, the contents are required to be proved with the same standard of proof as expected of primary evidence and it cannot be argued that it should be less onerous when it is secondary evidence. In fact in the very decisions relied on by the Learned Counsel for the plaintiff on the point of admissibility of secondary evidence in the case of Mst. Bibi Aisha and others as also in the case of Om Prakash which have been referred supra, it also relates to reliability of secondary evidence to prove the contents. In the instant case, the layout of the typed matter and the place at which it is signed and also there being no initials at the places where handwritten words are inserted, does not inspire confidence, more particularly in a circumstance when the witness has not even identified the document and the signatures therein. I am therefore of the considered opinion that the alleged WILL has not been proved in accordance with law. Hence, the declaration sought based on such WILL could not have been granted and the Court below was not justified in its conclusion. Points No. (i) and (iii) raised above are accordingly answered against the plaintiffs who are the respondents herein.

20. Insofar as the suspicious circumstances, the Learned Counsel for the defendants pointed out that the said Sri Krishnappa and Sri P.S. Goud who claim to be the witnesses to the WILL were examined as PWs. 4 and 7 and the first plaintiff herein was examined as PW. 9 in the earlier suit in OS. No. 95/1980 filed for recovery of money and the WILL also refers to the money that can be received by the first plaintiff herein and as such they have all connived in bringing about the WILL for mutual benefit. The other circumstance pointed out is that late Venkatswamy was not keeping well and had to be assisted by a helper. The nature of the Trust has also not been specified and is so vague that it is only an attempt to exclude the defendant who is a natural class-II heir of deceased Venkatswamy and knock off the property is further contention. The Learned Counsel for the plaintiff on the other hand contended that Sri P.S. Goud being his Auditor was a natural witness and the other witnesses were also known to late Venkatswamy, more particularly the first plaintiff is his nephew being his sister's son. The object of creating a Trust is also clear that he had no issues and the fact that he was being looked after by a helper would indicate that the defendant who is the brother had not looked after him. Hence the properties were to be applied for charitable purposes. The Learned Counsel has also relied on the decision of the Hon'ble Supreme Court in the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, that mere conjecture or unfounded suspicion is not sufficient to sway the verdict that the WILL is not proved. Though having noticed the rival contention, I do not find it necessary to delve in detail since the points No. (i) and (iii) are already held against the plaintiff. As such, the answer to point No. (ii) would not be material.

21. In view of the discussion made above, I am of the considered opinion that the WILL propounded by the plaintiffs has not been proved. Further the defendants by instituting a suit in O.S. No. 4156/1987 and the decree passed therein on 20.08.1997 (Ex. D1) have protected their possession of the properties. In the result, the following order:

ORDER

- i) The appeal in RFA No. 129/2010 is allowed.
- ii) The judgment and decree dated 07.11.2009 passed in O.S. No. 4030/ 1989 is set aside.
- iii) Consequently the suit in O.S. No. 4030/ 1989 stands dismissed.
- iv) In the facts and circumstances of the case, the parties shall bear their own costs