

(2007) 12 KAR CK 0018

In the Karnataka High Court

Case No : Regular First Appeal No. 346 of 2001 and R.F.A Crob No. 29 of 2001

Rukmini Bai and Manjunath Kashid

APPELLANT

Vs

Umabai Jadhav and Others
 Umabai Jadhav and Others
Vs Rukmini Bai and Manjunath Kashid

RESPONDENT

Date of Decision : 10-12-2007

Acts Referred:

Evidence Act, 1872 — Section 68, 69

Transfer of Property Act, 1882 — Section 119, 120

Citation : (2008) 4 KarLJ 303

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

Bench : Single Bench

Advocate : R.B. Deshpande, in R.F.A. No. 346/2001 and F.V. Patil, in R.F.A. 29/2001, for the Appellant; F.V. Patil, for R3-6, G. Balakrishna Shastry, for R2, 7 and 8 and Suresh P. Hudedagaddi, for C/R1 in R.F.A. No. 346/2001 and R.B. Deshpande in R.F.A. 29/2001, for the Respondent

Judgement

A.S. Bopanna, J.—The parties would be referred to in the same rank assigned to them before the Court below, for the purpose of convenience and clarity. The defendant Nos. 2 and 5 are before this Court in this appeal and the cross objections is filed by the plaintiff assailing the judgment and decree dated 30.11.2000 passed in OS No. 60/1989 on the tile of the III Addl. Civil Judge (Sr. Do) & CJM, Dharwad.

PLEADINGS OF THE PARTIES:

2. The plaintiff was before the Court, below in a suit seeking for a judgment and decree to award 1/8th share in all the suit properties by effecting partition by metes and bounds and also to handover the separate possession of the same to the plaintiff. The plaintiff claims to be the grand daughter of Late Ramachandra Kawatekar through the first wife Smt. Parvathi Bai. The defendant No. 1 is said to be the widow (second wife) of Late Ramachandra Kawatekar. The defendants 2 to 7 are the other grand children of Late Ramachandra Kawatekar while

defendant Nos. 8 and 9 are the great grand sons of Late Ramachandra Kawatekar. All the said grand children are the children of his daughter through the first wife Parvathi Bai. The plaintiff claims that the suit properties are self earned properties of her grand lather Late Ramachandra Kawatekar who died on 24.5.1987 intestate. It is further contended that the grand mother (first. wife of Ramachandra Kawatekar) died in the year 1935 whereas the mother of the said parties died in the year 1981. The said Late Ramachandra Kawatekar is said to have married the first defendant after the death of the first wife and did not have any issues from the said marriage. The plaintiff is said to have been brought, up by the grand parents. It is further contended that Late Ramachandra Kawatekar suffered paralytic stroke thrice simultaneously from 1963 to 1968 and as such he was unable to move without the attendance of somebody. It is further contended that he was completely bed ridden and he was also unable to talk clearly.

3. In the suit, it was alleged that since plaintiff was married to one Shankar Jadhav who was working in Air force and was being transferred from one place to another, defendants 1 and 2 colluded with each other to take complete benefit of the health condition of late Ramachandra Kawatekar. It is further alleged that, in the year 1981 when the daughter of late Ramachandra Kawatekar i.e., the mother of the plaintiff viz., Smt. Krishnabai died and when he was in deep sorrow and depression, they got. created a false and bogus sale deed of the property bearing No. 47/2 measuring 5 acres in favour of the minor great grand son Rajendra. It is also alleged that, one more false and bogus gift, deed of the property bearing No. 47/1, measuring 5 acres in favour of another minor great grand son Chimmaji was also obtained by misrepresentation, fraud and deception. The said two transactions have taken place only one month after the death of Krishnabai. It is therefore contended that late Ramachandra Kawatekar never entered into any kind of transaction and he did not alienate any suit properties to any person. The plaint, is subsequently amended after filing of the written statement by the defendants to add one more contention that defendant No. 2 got created a false and bogus WILL from Late Ramachandra Kawatekar bequeathing the entire properties in favour of defendant Nos. 2 and 5 and as such it is contended that the said Late Ramachandra Kawatekar has never made a WILL in his life time to any persons. That apart, the plaintiff contends that the second defendant has also purchased one agricultural land at Kurabgatti bearing RS No. 20/1B measuring 2 acres 27 guntas in her name out of the profits earned from the other suit properties and funded by the first defendant Hence, it. is claimed that this property is also the property of late Ramachandra Kawatekar. In this back ground, it is alleged that the suit properties are the joint family properties of late Ramachandra Kawatekar and has remained so till the date of filing the suit. The plaintiff claims that though she approached defendant No, 1 to get her 1/8th share in the entire suit properties, the same has been denied and therefore the plaintiff has filed the suit.

4. On being notified of the suit, the defendants have appeared and filed their written statement. The defendant Nos. 3 to 6 have supported the ease of the

plaintiff. The defendant No. 5 has filed an independent written statement wherein the claim put forth by the plaintiff for share in the properties have been denied. It is contended that, though the other properties were self acquired properties of late Ramachandra Kawatekar, the property shown in suit schedule No, 1F is not. the self acquired property of late Ramachandra Kawatekar, but it is contended that the suit property has been purchased by the second defendant in her individual capacity. It is further contended that, late Ramachandra Kawatekar together with the first defendant executed a registered WILL dated 23.11.1968 in respect of the properties indicated in the written statement and that. late Ramachandra Kawatekar was in sound disposing state of mind and the WILL has been executed out of his free will. The said defendant therefore sought for dismissal of the suit. The defendant No. 1 also has filed a written statement independently and has disputed the case put forth in the plaint. It. is stated that the genealogy and the fact that all other properties indicated in the suit schedule are the self acquired properties of late Ramachandra Kawatekar cannot be in dispute. But Item 1F property is that of the second defendant. It was purchased by the second defendant from the previous owner for a consideration of Rs. 30,000/- on 5.12.1978. The other family history which has been stated is admitted. However the contention of the plaintiff that late Ramachandra Kawatekar had suffered paralysis from 1963-1968 has been denied. The allegations with regard to collusion and the creation of the documents alleged by the plaintiff has been denied by the said defendant. With regard to the gift deed executed in the year 1981, the said defendant has stated that, the same had been executed with free will and out of love and affection for the great grand children. With regard to the sale deed, the defendant states that her husband sold the property bearing No. 47/2 in the name of defendant No. 9 for a consideration of Rs. 25,000/-. With regard to the WILL dated 23.11.1968, the said defendant has stated that the WILL in respect of the properties owned by late Ramachandra Kawatekar had been registered and he was of sound and disposing state of mind during that period and even thereafter. It is contended that the first defendant was given life interest in the property covered by the WILL. The said defendant has also adverted to details of each of the properties and in effect the defendant has denied the case put forth by the plaintiff seeking for a share in the suit properties. The defendants 2, 8 and 9 have filed a joint written statement which is more in line with the written statement filed by the first defendant. The defendant No. 7 has also filed separate written statement in support of the case of the plaintiff.

ISSUES CONSIDERED BY TRIAL COURT:

5. The Court below noticing the rival contentions put forth framed as many as 8 issues initially and 6 additional issues thereafter, which were subsequently recast and ultimately 10 issues were framed for its consideration, which read as here under.

1. Whether the plaintiff proves that the Will executed by late Ramachandra

Kawatekar jointly with the first, defendant was created by fraud?

2. Whether the deceased Ramachandra Kawatekar was in a sound disposing state of mind and physically fit at the time of the execution of the Will dtd. 23-11-1968?

3. Whether the plaintiff proves that the gift deed executed by Ramachandra Kawatekar in favour of the 8th defendant on 28-5-1981 is a created and bogus document?

4. Whether the plaintiff proves that the sale deed dtd. 28-5-1981 executed by Ramachandra Kawatekar in favour of the 9th defendant is created, bogus and sham document?

5. Whether the plaintiff proves that survey No. 20/1B of Kurabagatti village is also the self acquired property of Ramachandra Kawatekar?

6. Whether the plaintiff and defendants 3, 4, 6 and 7 prove that they are not bound by the sale deed dtd. 28-5-1981 executed by Ramachandra Kawatekar in favour of the 9th defendant and gift deed dtd. 28-5-1981 executed by Ramachandra Kawatekar in favour of the 8th defendant?

7. Whether the plaintiff and defendants 3, 4, 6 and 7 prove that they have got 1/8th share each in the suit property?

8. Whether the defendants 2, 8 and 9 prove that the plaintiff ought to have sought for the relief of cancellation of the gift deed and sale deed in question? If so, what is its effect, on the suit?

9. Whether the plaintiff and defendants 3, 4, 6 and 7 prove that, they are entitled to partition and separate possession of 1/8th share each in the suit properties?

10. What order or decree?

6. In order to discharge the burden cast on the parties by the Court below, the plaintiff examined herself as PW.1 and examined 8 witnesses as PWs.2 to 9, The documents at Exhs.P1 to P44a were marked in support of the plaintiff's case, The first defendant examined herself as DW.1 and examined 8 other witnesses as DWs.2 to 9, The documents at Exhs.D1 to D59 were marked.

7. The Court below on appreciating the oral as well as documentary evidence placed before it and the contentions raised by the parties has ultimately held issue No. 1 in the affirmative while Issue Nos. 3 to 7 were held in the negative and issue Nos. 2,8, 9 and 10 were disposed of as per the order made by the Court below. The defendants 2 and 5 claiming to be aggrieved by the finding on issue Nos. 1,7 and 9 whereunder the Court below has held that the WILL was created by fraud and shares were assigned to the plaintiff and defendants 3,4, 6 and 7 has assailed the judgment in the appeal. The plaintiff and defendants 3,4,6 and 7 have assailed the judgment in the cross objection in so far as the findings

which have been held against them while considering the genuineness of the WILL and also the sale and gift, transaction which had been questioned. The first defendant is said to have expired during the pendency of these proceedings.

RIVAL CONTENTIONS IN THIS APPEAL:

8. Sri Venkatesh Dalawai, learned counsel for the appellant while assailing the judgment and decree would contend that the Court below was not justified in coming to the conclusion that the WILL-Ex.D1 is clouded with suspicion. The learned counsel would point out that in respect of the contention urged by the plaintiff regarding the ill-health of the testator and also regarding the genuineness of the WILL, the Court below has rejected the contention put forth by the plaintiff and has held that the WILL is genuine and valid. Having said so, the Court below was not justified in thereafter coming to the conclusion that the WILL is clouded with suspicion. In this regard, the only reasoning adapted by the Court below to come to such a conclusion is that the attestors to the WILL had not been examined. The other reason indicated by the Court below is that there is over-writing of the signature of the testator. On these aspects, the learned counsel would contend that the defendants 1, 2 and 5 have proved that both the attesting witnesses had died and therefore their respective sons have been examined to identify their signatures and as such the same constitutes sufficient proof as contemplated u/s 68 and 69 of the Indian Evidence Act. Therefore, in that regard the WILL had been proved as required u/s 63 of the Indian Succession Act. With regard to the observation of the Court below that there is over-writing of the signature of the testator, the learned counsel would contend that in fact the interested persons have indulged in such mischief since the said aspect was never an issue in the suit and it has never been alleged by the plaintiff in this regard. The observation made in the judgment, in fact has come as a surprise to the appellants. In this regard, the learned counsel would contend that the xerox copies of the registered WILL available would indicate that there is no over-writing of the signature of the testator and as such at the time of presentation of the WILL to the Court, there was no such over-writing. Further in the entire oral evidence tendered by the parties or in any one of the cross-examination, this has not been raised by any of the parties. Therefore it is contended that the same cannot be held against the appellant. Further in answer to the issues raised in the cross objection, the learned counsel would contend that the findings of the Court below that the testator need not have indicated the reason to exclude the other legal heirs and that the plaintiff had not proved that the testator had suffered from any illness, has been rendered after properly appreciating the evidence on record.

9. Sri Balakrishna Shastry, learned counsel appealing for defendants 8 and 9 apart from supporting the contention put forth by the learned counsel for the appellant, would also refer to the evidence tendered before the Court below and would contend that the Court below was justified in holding that the plaintiff has not proved that the gift deed and sale deed dated 28.5.1981 executed by late

Ramachandra Kawatekar in favour of defendant Nos. 8 and 9 have been obtained by fraud. The learned counsel would contend that the said defendants are the great grand sons of late Ramachandra Kawatekar and out of his natural love and affection and for necessity has executed these documents in their favour and the said documents are validly registered in accordance with law. The said documents have been executed in the year 1981 and admittedly late Ramachandra Kawatekar lived up to 1987. If the said late Ramachandra Kawatekar did not choose to challenge the same for such a long period, the plaintiff has no right whatsoever to question the same and as such the learned counsel contended that the said finding requires to be affirmed. With regard to the execution of the WILL by late Ramachandra Kawatekar, the learned counsel would also refer to the fact that the WILL had been executed in the year 1968 i.e., the said document is more than 30 years old and the document, has been proved before the Court below by examining the relevant witnesses who were available at the time of consideration of the suit and such proof is in accordance with the provisions contained in the Evidence Act. The learned counsel would also refer to the exhibits marked in "D" series to indicate that even though it is the case of the plaintiff that late Ramachandra Kawatekar had suffered consecutive paralytic strokes from 1963 to 1968, the said documents would indicate that during the said period and much thereafter also Late Ramachandra Kawatekar was carrying out his avocation, the signatures were being affixed and the said documents being of an undisputed point, of time would have to be relied on. On the aspect of over-writing of the signature of the testator as stated in the judgment, the learned counsel would refer to the same and would state that the said issue had not arisen at an earlier point of time. It is further pointed out by the learned counsel that on noticing the said judgment, the defendants filed a review petition in Misc. No. 4/2001 by producing the xerox copy of Ex.D1 to indicate that there is no over-writing, It is in that respect, respondent No. 2 herein had filed an application seeking for transmitting of the records for consideration of the said case, however the same was not pressed since this appeal was pending.

10. Sri F.V. Patil, learned counsel appealing for the plaintiff while opposing the appeal and supporting the cross-objections would contend that in so far as the finding rendered by the Court below that Late Ramachandra Kawatekar had not suffered paralytic stroke and that the WILL is genuine, the same is contrary to the evidence available on record. The learned counsel would refer to the oral evidence tendered on behalf of the plaintiff to state with regard to the said aspect and also the evidence tendered by the plaintiff's witnesses wherein they have clearly stated that Late Ramachandra Kawatekar had suffered paralytic stroke between the years 1963 and 1968. It is further contended by the learned counsel that defendant No. 1 herself has admitted that Late Ramachandra Kawatekar was not well and therefore the fact that he has suffered paralytic stroke had been established by the plaintiff. Therefore, the Court: below was not justified in coming to a contrary conclusion. The learned counsel would contend

that. Late Ramachandra Kawatekar due to his illness was dependent on the first defendant, and the first defendant taking advantage of the situation has brought into effect the documents which have been questioned by the plaintiff. It is therefore contended that the WILL dated 23.11.1968, the sale deed and the gift deed both dated 28.5.1981 have been secured taking advantage of the fact that late Ramachandra Kawatekar was not in a position to know as to nature of the document being executed by him. With regard to the property purchased in the name of the second defendant i.e., Item No, 1F, learned counsel would contend that the second defendant has not proved that either she or her husband had any independent income. Therefore the property purchased has been financed by the first defendant from the income derived from other properties belonging to late Ramachandra Kawatekar. Hence, the said property is also one of the joint properties from which the plaintiff is entitled to a share. Alternatively it is contended by the learned counsel that even assuming for a moment that the WILL is genuine, the reading of the WILL would indicate that the WILL would come into effect on the death of both testator and his wife Ambabai i.e., the first defendant. It is therefore contended that the bequest is a contingent one and had not vested in the legatees as on the date of death of the testator. Hence, on the death of the testator i.e., on 24.5.1987 since he is the original propositus, the succession would open on the said day and the WILL not having come into effect the plaintiff in any event would be entitled to a share in the property. The learned counsel would contend that at the outset, the Court below was justified in holding that the WILL is suspicious. However, even on the other issues the Court below should have held that the execution of WILL is not valid and in any event in view of the alternate contention, the plaintiff is entitled to a share. Sri. Suresh P. Hudedagaddi, learned Counsel would also adapt the line of contention in this regard.

11. In reply to the contention with regard to vesting of the property as contended by Sri F.V. Patil learned counsel for the plaintiff, Sri Venkatesh Dalwai, learned counsel for the appellants would contend, the fact that the properties are the absolute properties of late Ramachandra Kawatekar is not in dispute, Smt. Ambabai being the wife had only joined the WILL. The contents of the WILL to say that the WILL would come into effect on the death of both the testator and his wife would not mean that it is a contingent bequest, but the legacy would vest on the death of the testator i.e., on 24.5.1987. This is so because even though the coming into effect of the WILL has been stated as on the death of his wife also, the death of a person is not an uncertain event and cannot be termed as a contingent bequest. On the other hand, due to certainty, the legacy would vest in the beneficiaries even prior to the death of the wife.

POINTS CONSIDERED IN THIS APPEAL:

12. In the background of the contentions urged by the respective learned counsel, the following points arise for my consideration:

i) Whether the WILL dated 23.11.1968 executed by Late Ramachandra

Kawatekar is valid and as to whether the Court below was justified in holding the same as suspicious in the manner it has done despite finding it valid on other aspects?

ii) If the WILL is held to be valid, what is the nature of bequest and what would be the relevant date of vesting of legacy ?

iii) If the legacy had not vested, whether the plaintiff and the defendants are entitled to a share in the property ?

iv) Whether the Court below was justified in holding that the gift deed and the sale deed both dated 28.5.1981 in favour of defendant Nos. 8 and 9 respectively are valid ? and

v) Whether item No. 1F property is the absolute property of the second defendant ?

13. The perusal of the records and the arguments addressed by the respective learned counsel would at the outset indicate that, the relationship between the parties is not in dispute. It is also not in dispute that the properties indicated in the WILL and the properties conveyed under the gift deed and sale deed both dated 28.5.1981 are self acquired and absolute properties of late Ramachandra Kawatekar. Therefore, on the face of it, the legal right of Late Ramachandra Kawatekar to execute the said documents cannot be disputed by any of the parties. Therefore, if at all the plaintiff has to succeed in the suit in questioning the said documents, it could only be done if the plaintiff establishes that Late Ramachandra Kawatekar was incapacitated in any manner and therefore the said documents were not executed out of his free will and consent, but the said documents have been obtained by playing fraud and misrepresentation. Insofar as the property bearing Sy.No. 20/B indicated in item No. 1F of the suit schedule properties which has been purchased by a sale deed in favour of the second defendant, if the plaintiff" is to succeed in claiming that she is entitled to a share in the said property, it would have to be established that the said property has been purchased out. of the funds which were generated from the properties which belonged to late Ramachandra Kawatekar. Therefore, keeping these aspects in view, the evidence tendered by the parties would have to be noticed to come to the conclusion as to whether the plaintiff has discharged the burden.

ANALYSIS AND CONCLUSION REGARDING VALIDITY OF WILL:

14. One of the primary factors which requires to be noticed is that the plaintiff, at the first instance, had not questioned the WILL in the suit, it is only on the filing of the written statement and the contention being urged by the defendants, the plaintiff thought it fit to amend the plaint to state that the WILL had been obtained by fraud. Except for stating that defendant. No. 2 has created false and bogus WILL from the said late Ramachandra Kawatekar, there is no other pleading to contend, in what manner the said document is either false or bogus. Though it is attempted to be explained by the learned Counsel that the WILL was

known only during proceedings of the suit, the PW-1 in her cross examination has admitted knowledge prior to filing the suit, No doubt the law is well settled that the propounder of the WILL would have to remove the suspicion if any with regard to the WILL. In the instant case, the WILL is a registered document of the year 1968 and the plaintiff in fact should have pleaded the suspicious circumstances if any under which the WILL has been executed and only on raising such suspicion, the defendants would have been in a position to remove the suspicion if any. However, while tendering evidence, the plaintiff who was examined as PW.1 has put forth the case that the testator-Ramachandra Kawatekar had suffered paralytic stroke between the years 1963 and 1968 and was bed ridden. The attempt of the plaintiff is to contend that therefore the WILL cannot be said to have been executed by Late Ramachandra Kawatekar out of his free will since Smt. Amba Bai who was in control of Late Ramachandra Kawatekar has got the same executed as per her desire. The further evidence and the cross examination of PW.1 is voluminous. The essence of it is to that extent wherein surrounding circumstances have been stated with regard to PW.1 being away and Rukmini Bai i.e., the second defendant while staying with late Ramachandra Kawatekar has taken advantage of the situation and got the WILL, sale deed and gift deed executed. However in an attempt to establish the main contention regarding illness of late Ramachandra Kawatekar, the witnesses namely Yellappa-PW.2, Narasing Manappa Rasale- PW.3, Vasudev Mane- PW.5 and Arjun Subrao Kadam- PW.6 have been examined, The said persons claim to be known to the family and that they were aware that Late Ramachandra Kawatekar had suffered paralytic strokes during the year 1962 to 1968, A perusal of their evidence no doubt would indicate that, they have stated regarding their familiarity with the family and the fact that Late Ramachandra Kawatekar had suffered paralytic stroke. In fact PW.5 has stated that after suffering the third attack, he was not in a position to get up or speak. While stating with regard to illness, it has also been stated that Ramachandra Kawatekar was treated by Dr. Mummigatti, but the said doctor is dead. Therefore, his son Dr. S.G. Mummigatti was examined as PW.7 to state that his father was treating Ramachandra Kawatekar and thereafter he had also treated him. However, in the cross-examination, the said doctor was unable to give any details with regard to the treatment rendered nor the records maintained in that regard. The evidence tendered by the said witnesses would not be of much importance, in the present case of this nature, since there has been certain inconsistencies in the evidence wherein the witnesses more particularly, PWs.2 and 3 have been divergent in their evidence regarding the portion of the body to which paralytic stroke was suffered when one says it is to the right portion, the other says that it is to the left portion.

15. Notwithstanding the fact that the said witnesses have not been able to establish in unequivocal terms that Late Ramachandra Kawatekar had suffered paralytic stroke during 1963-68 and even if the contention of the learned counsel for the plaintiff is considered wherein he contends that the first defendant herself

has admitted in her evidence that Late Ramachandra Kawatekar had suffered paralytic stroke, and even if it is a fact, I am of the view that the same would not be conclusive in so far as the question which is before us. Even assuming for a moment that Late Ramachandra Kawatekar had suffered paralytic stroke during periods 1963 to 1968 what requires to be further established is that due to such illness, he was incapacitated mentally and was not in a position to comprehend what he was doing and was not able to take any decisions with regard to any matter. In the case on hand, there is no such attempt made by the plaintiff to establish this fact that. Late Ramachandra Kawatekar was in such a state that he was unable to decide anything. This is more so because it is contended by the plaintiff that. Smt. Ambabai was instrumental in getting the deeds executed. At the outset, Smt. Ambabai being the wife of late Ramachandra Kawatekar was the step grand mother of the grand children of late Ramachandra Kawatekar and a specific reason to prefer anyone with an ill-motive was also required to be brought out convincingly. Contrary to this, as against the contention put forth by the plaintiff, with regard to the illness of the testator, apart from the fact that the WILL dated 23.11.1968 is a registered document executed and registered before the Sub-Registrar, the defendants have examined Sri Mallikarjun Gangappa Nadakatti DW.2 and Sri Shankarappa Channaveerappa Uppin DW.5 to establish that even during the periods 1963 to 1968 and thereafter, the testator was personally looking after the agricultural activities and was supplying the agricultural products to their shops, The said persons are business men who deal in agricultural products of buying and selling the same, While receiving the goods and when the payments are made appropriate receipts are maintained. The said receipts which are said to have been maintained at. an undisputed point of time during the said course of business have been exhibited at Ex.D10 to D55. The receipts date up to the year 1970. In the said receipts Late Ramachandra Kawatekar has signed in acknowledgment of the transaction between the traders and himself which would indicate that he was in a position to carry out his activities without any hindrance. Therefore, if he could act on his own during the said period, there is nothing to assume that as on the date of execution and registration of the WILL, he was not able to comprehend what he was doing. Therefore, the plaintiff had not established that the WILL had been brought, about in the manner alleged by her. On the other hand, the propounder of the WILL viz., the second and 5th defendants through the evidence of the first defendant who is also a signatory to the WILL have established that the WILL had been executed by late Ramachandra Kawatekar knowing the contents of the same.

16. The next aspect of the matter is as to whether the plaintiff has raised any other suspicions circumstance regarding the WILL and if so; whether the propounder of the WILL has established the WILL keeping in view the well settled principles of law on this aspect. Further as to whether the Court below has appreciated it in its correct perspective. The other suspicious circumstances raised on behalf of the plaintiff is that the WILL does not. disclose the reason for

excluding the other grand children; the WILL is dated 23.1.1968, whereas late Ramachandra Kawatekar died on 24.5.1987 and as such the circumstance to execute the WILL so early in life has not been explained; the attestors to the WILL have not been examined and the sons examined have only identified the signature, and as such the same does not amount to proof of the contents. The Court below has taken note of the contentions put forth on behalf of the plaintiff and by the defendants. Insofar as the nondisclosure of the reasons in Ex.D.1 to exclude the other grand children the Court below on noticing the decision rendered by the Hon"ble Supreme Court in Smt. Sushila Devi Vs. Pandit Krishna Kumar Missir and Others, and Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, has rightly come to the conclusion that the same does not amount to a suspicious circumstance. Though this alone would have been sufficient to uphold the finding of the Court below on this aspect, considering that the plaintiff has filed cross-objection, I deem it necessary to notice the decisions rendered by the Hon"ble Supreme Court in the case of Savithri and Ors. v. Karthyayani Amma and Ors. AIR 2007 SCW 6787. wherein the Hon"ble Supreme Court has not only held that depriving a share to the natural heir is not a suspicious circumstance but. the background facts should also be taken into consideration.

In the instant case, the plaintiff as well as the defendants 2 to 7 are all the grand children of late Ramachandra Kawatekar born through his first wife's daughter Smt. Krishnabai. To Smt. Ambabai, i.e the first defendant, all of them are the step grand children and she did not have any issues of her own. Even though an allegation has been made against Smt Ambabai that she was instrumental in getting the WILL executed, she has not benefited herself in any manner, but the beneficiaries are the second and fifth defendants who were also the step grand children like the others and as already noticed no specific ill motive is alleged. Hence, if Ramachandra Kawatekar and Ambabai as grand parents have chosen only two of their grand children, they would have had their own reasons even though the same has not. been disclosed in the document. This aspect no doubt could have been looked at. from a different angle if the WILL was not a registered document and if the contention that it is a created document by the beneficiaries was put forward and if it was anywhere nearer to the date of death of the testator.

17. In the instant case, the beneficiaries were minors on the date of execution of the WILL and it is not. even the case that they have taken part in the execution of WILL, If the testator who is the grand father in his wisdom had thought it fit. that the properties indicated in the WILL should be enjoyed only by two grand children after the demise of his wife Ambabai, this Court cannot sit in judgment over the same as held by the Hon"ble Supreme Court in the case of Gurdev Kaur and Ors. v. Kaki and Ors. AIR 2006 SCW 2404. The duty of the Court would only be to test the authenticity of the WILL in terms of Section 63 of Indian Succession Act. Any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not. normally

expected in a normal situation or is not expected of a normal person. A WILL is normally executed to interrupt the normal succession so that the testator would prefer some and exclude others and as such it cannot be said that it is unnatural or suspicious. Therefore, the authenticity of the document would have to be considered. In this regard, the circumstances indicated in the case of SAVITHRI & OTHERS by the Hon'ble Supreme Court would be available to the instant case. The WILL is admittedly registered and in the case on hand, the testator has lived for 19 years after the execution and registration of the WILL and as already noticed, the exhibit "D" series would indicate that the testator was carrying out his activities without hindrance and as such he had all the time in the world if he had any other intention. Hence, the authenticity of the WILL to that extent cannot be doubted from the surrounding circumstance of this case.

18. The next aspect would be regarding the examination of the attesting witnesses. It cannot be disputed that both the attesting witnesses had expired, since the same is established by Exhs.D.2 and D3 being the death certificates. Hence, the nature of proof would be as contemplated u/s 69 of the Evidence Act. In fact, in the instant case the sons of the deceased attesting witnesses have been examined as D.Ws.3 & 4, who have identified the handwriting and signature of their father and they are the natural persons to identify the same. The proof of the contents of the documents by the said witnesses is not a requirement of law and as such, the Court below has erred on this aspect. One other aspect is that one of the attesting witness namely Rudrappa Basavanthappa Menasinkai is also a witness to the sale deed dated 18.4.1959 whereunder the testator had purchased the property and the same is marked as Ex.D.5(a). This would indicate that he was a person who was known to the testator and therefore a natural attesting witness. That apart, even though the first defendant Smt. Ambabai has joined the WILL, since she is not the owner of the properties, she would not be the testator and if she is considered as a witness, she would be the most competent witness not only for proving the signature of the testator, but also to the circumstances of the WILL. The first defendant was examined as D.W.1 and has stated in detail with regard to the family details. The signature on the WILL was identified as D.1(a) and (b) and she has stated with regard to the WILL, She has also identified the signature of her husband in Exhs.D.6, 7 and 8 which are lease deeds which are not only similar but documents subsequent to the period of the illness alleged by the defendants. Though, she has been cross-examined at length, there is nothing to discredit, the evidence whereby she has identified and proved the signature of the testator.

19. While on this aspect itself, the other reason for which the Court below has held the WILL to be suspicious also is to be noticed i.e., on the ground that, the signatures are overwritten, Before proceeding further a perusal of Ex.D.1, the original of WILL would no doubt indicate that, on the signature of the testator, the same is written once over again in fresh ink. So is the case with regard to the signature of the attesting witness. A bare perusal would make it clear that, it is a

tampering only to make it appear to be suspicious. This has not been an issue throughout the pendency of the suit Though D.W.1 has identified and marked the signature, this aspect has not been brought out or disputed in the cross-examination though lengthy cross-examination has been made. That apart D.Ws.2 & 3 have identified the signature of their father as attesting witnesses as contained in Ex.D.1 as Ex.D-1(J) and (K) respectively but even in their cross-examination the overwriting has not been suggested. That, apart, the said document is a registered document and in fact one correction which appears on Page-4 has been noted as striking off at. the bottom of Page-5 of the WILL i.e., before the signature and therefore if this was a correction or interpolation prior to registration it. would have been noticed and the fact that, it is fresh ink would indicate that any obliteration or overwriting was not. simultaneous at the time of registration since the original signature which is also visible indicates that the ink is matching to the other wilting. When this was not an issue during the entire trial and when the overwriting is not in the nature of a forgery, it is hard to accept the same as a suspicious circumstance to discredit the WILL, Further, immediate steps have been taken to file review in Misc. Case No. 4/01 and Misc. No. 8/2001 by producing the xerox copy of the WILL which did not contain overwriting. The review petition No. 8/2001 is said to be disposed of as not pressed while Misc. No. 4/2001 is said to be pending. In an appropriate proceedings additional evidence would have been required but in the instant case, I have already noticed that this was never the controversy throughout, the trial and it has sprung up only in the judgment, The photo copy which was made available at the hearing for comparison was also perused by me which does not. contain overwriting and it is clearly evident from Ex.D.1 itself that, it is a mischief played to make the document to appear suspicious which was not otherwise suspicious, though it is difficult, to point fingers at anyone. However, while the court is examining the WILL to satisfy its conscience that no suspicious circumstances exist, if at all there are any, it should, appeal as an integral part of the document itself or its surrounding circumstances and not merely cosmetic creations.

20. According to Sri F.V. Patil, learned counsel one other circumstance to disbelieve the WILL is, if the WILL had in fact been executed, the same would have found a mention in the gift deed and sale deed which were subsequent, being of the year 1981. This argument, cannot, be accepted for more than one reason. Firstly, the WILL is a registered document, and as such its existence prior to 1981 cannot be doubted. Secondly, the items of property conveyed under the gift deed and sale deed were not subject, matter of the WILL and as such no reference was required. Thirdly, though there is no definite material on record as to the period of purchase of the properties by Late Ramachandra Kawatekar, the fact that the items of property in the gift deed and sale deed were not made part of the WILL would indicate that the testator was conscious about regulating his properties at the appropriate time and appropriate manner.

On the other hand, if it is assumed that the said properties were the subsequent

acquisition of late Late Ramachandra Kawatekar, then it would mean that he was fit enough to manage his affairs, Therefore, in either case, it would make the WILL more authentic instead of creating suspicion. The WILL is a solemn document and the desire of the person who has left the World with the belief that he has regulated his properties cannot be interfered with lightly when the document is not suspicious. Hence, I am of the view that the court below was not justified in coming to its conclusion that Ex.D.1 is clouded with suspicion and holding issue No. 1 in the affirmative. Point No. (i) raised by me is answered accordingly.

ANALYSIS AND CONCLUSION REGARDING VESTING OF LEGACY:

21. On arriving at such conclusion, the next facet of the matter for consideration would be regarding the date of vesting. In the instant case, the fact that the properties which are the subject matter of the WILL are the absolute properties of the testator is not in dispute. Though his wife Ambabai had joined as testator, she had no right over the property. The testator has however specified that, the WILL would come into effect, after the death of both Late Ramachandra Kawatekar and Ambabai. It is therefore contended on behalf of the plaintiff that it is a contingent bequest and since Smt. Ambabai was alive as on the date of death of the testator on 24.5.1987, the legacy has not vested and the succession has opened on that day and as such all legal heirs are entitled to a share. This is however opposed by the learned counsel for the contesting defendants.

22. The provision contained in Section 104 of the Indian Succession Act provides regarding vesting of legacy in general terms i.e., on the death of the testator. In the instant case the provisions of Section 119 and 120 of the Indian Succession Act would have to be considered so as to determine whether the condition stated in the WILL about, the coming into effect on the death of the wife is to be treated as if the property would not vest till her death and about the legal consequence if the testator dies prior in time and as to whether the succession would open. The question therefore is whether the mentioning of the death of wife would make it a contingent bequest, The decision of the Hon'ble Supreme Court in the case of Rajes Kanta Roy Vs. Santi Debi, relied on by Sri P.V. Patil, learned Counsel, is not analogous to the case on hand since what was being considered therein was the purport of the trust deed executed by the father and the conditions imposed therein were of different nature. However the guidance rendered by the Hon'ble Supreme Court is that it would have to be considered in terms of Section 19 and 20 of Transfer of Property Act and Section 119 and 120 of Indian Succession Act. Further, intention is to be gathered from the document and the Court should approach the task of construction in such cases with a bias in favour of a vested interest, unless the intention to the contrary is definite and clear. In the instant case, as noticed above, the only intention of the testator is that the WILL should come into effect, after the death of his wife and nothing more. Sri. Venkatesh Dalawai, learned counsel would place reliance on a decision of the Division Bench of the Andhra Pradesh High Court in the case of Chilamakuri Chinna Pullappa Vs.

Guruka Chinna Bayanna and Others, wherein a similar contention was considered and it was held that, the daughter would take the vested interest on the death of testator. The Hon'ble Supreme Court in the case of Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others, has held that legacy would be contingent only in the case of specified uncertain event. The death of the wife is not a specified uncertain event, and therefore not a contingent bequest. The vesting of the bequest would not get postponed till the death of the interposer, Therefore on considering these aspects of the matter and noticing that the only condition in the instant case for the WILL to come into effect being the death of the wife, the same cannot be considered as a contingent bequest Hence the bequest made under the WILL dated 23.11.1968 by Late Ramachandra Kawatekar has vested in the legatees on the testator's death on 24.5.1987 and as such the properties which are the subject matter of the WILL had not opened for succession. Hence the plaintiff and the defendants were not entitled to any share in the properties. The point nos. (ii) and (iii) raised by me is therefore answered accordingly.

ANALYSIS AND CONCLUSION REGARDING GIFT & SALE DEED:

23. The next question for consideration is regarding the validity or otherwise of the gift deed and sale deed both dated 28.5.1981 whereunder the suit Item A and B schedule properties are conveyed to the defendants 8 and 9 respectively by Late Ramachandra Kawatekar. The fact that the said documents are registered documents cannot be in dispute since the plaintiff has produced and marked the certified copies as Ex. P 17 and 18, The perusal of the same would indicate that Late Ramachandra Kawatekar has conveyed the properties indicated in the said documents to defendant Nos. 8 and 9 respectively out of love and affection and for necessity. The said defendants are none other than the great grandchildren of Late Ramachandra Kawatekar and sons of the second defendant. The only ground on which the documents are questioned both in the pleading and evidence of PW-1 is that their mother Krishna Bai died on 23.4.1981 and she was the only daughter of late Ramachandra Kawatekar, as such he was sad and depressed and taking advantage of this, the documents were got executed. The allegation in this regard and with regard to change of revenue entries are made against the first defendant, but all these documents do not give any benefit to the first dependant. The plaint does not indicate as to how she became aware of the documents, though has stated about the document. The WILL was not questioned initially as if she had no knowledge but in cross-examination admitted she was aware of it prior to filing the suit. These aspects indicate that the plaintiff has not approached the Court with clean hands but appears to be an afterthought despite being aware about the transactions and the desire of the grandfather. Further PW-1 has stated that her grandfather was mentally sound till her death and was conscious about his acts. In that background even if the documents were executed in 1981 while her grandfather was depressed, he was alive till 1987 and he had not raised any issue with regard to the same. The plaintiff has therefore failed miserably in establishing that the said documents

are not valid. The point No. (iv) raised by me is answered accordingly.

ANALYSIS AND CONCLUSION REGARDING ITEM 1(P) PROPERTY):

24. With regard to the property bearing Sy No. 20/1B of Kurubgatti Village, i.e., suit, schedule Item No. 1(1) property, the allegation is that though it is purchased in the name of the second defendant, neither the second defendant nor her husband had any resources and as such it is purchased from the funds of late Ramachandra Kawatekar. It is therefore contended that, the property is also belonging to Ramachandra and as such plaintiff is entitled to a share. The Court below has considered this aspect, in detail and rejected the claim of plaintiff. I do not deem it necessary to advert into details since in any event the conclusion cannot be found fault with for one more reason i.e., in this judgement I have not only held the WILL to be valid but held that the properties have also vested in the legatees on the death of the testator. No doubt the actual possession would have been postponed till the death of the first defendant if she wanted to retain possession but. in the present, case there is no conflict of interest between the interposer and the legatee. Therefore in any event first, second and fifth defendants could have enjoyed the property from the date of death of the testator. The allegation as noticed is that the first defendant has used funds from these properties to purchase the suit item 1(F) property. Even if it. is assumed to be correct, they had the right to do so since the other properties had vested and if the said property is purchased out of the same it would be their absolute property and even in such situation the plaintiff and the supporting defendants cannot claim any right Point. No.(v) raised by me is answered accordingly.

25. For all the above said reasons the finding of the Court below on issue No. 1, 7 and 9 cannot be sustained and the same are accordingly set aside. In the result, the following:

ORDER

(i) The appeal in RPA No. 346/01 is allowed.

(ii) The cross objection No. 29/01 is dismissed.

(iii) The judgement and decree dated 30.11.2000 passed by the Addl. Civil Judge (Sr. Dn.) & CJM, Dharwad O.S.No. 60/1989 is set. aside insofar as the findings rendered against the appellant and consequently the suit filed by the plaintiff is dismissed.

(iv) Since the parties are related to each other, they shall bear their own costs throughout.