

(2010) 06 KAR CK 0123

In the Karnataka High Court

Case No : Regular First Appeal No. 1234 of 2009

Sri B.Y. Narasimha Prasad Rao

APPELLANT

Vs

Smt H.S. Saraswathi Rao

RESPONDENT

Date of Decision : 29-06-2010

Acts Referred:

Hindu Adoption and Maintenance Act, 1956 — Section 4, 9
Hindu Succession Act, 1956 — Section 14 (1), 14 (2)

Citation : (2010) 4 KCCR 2587

Hon'ble Judges : N. Ananda, J;D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : A. Madhusudhana Rao, for the Appellant; K. Giridhar, for the Respondent

Final Decision : Dismissed

Judgement

N. Ananda, J.—The unsuccessful plaintiff in O.S. No. 10745/2006, who had sought for the following reliefs has filed this appeal:

17) Wherefore, it is most respectfully prayed that this Hon''ble Court be pleased to pass a Judgment and decree in favour of the Plaintiff and against the defendants, and declaring that the Defendant has only a life interest in the schedule property in view of the registered Will dated 05.04.1991 executed by late Sri. S.R. Shankarnarayana Rao, and granting a decree of permanent injunction restraining the Defendant from alienating or inducing any third parties in the suit schedule property, award costs and grant such other reliefs as this Hon''ble Court deem fit to grant in the circumstances of the case.

2. We have heard the learned Counsel for parties.

3. The points that would arise for determination are as follows:

1. Whether the plaintiff has proved that he was adopted by late S.R. Shankarnarayana Rao, husband of defendant and defendant?

2. Whether the plaintiff has proved that late S.R. Shankarnarayana Rao had executed a registered will dated 05.04.1991 (Ex.P.13), creating first life estate in favour of defendant and second life estate in favour of plaintiff, bequeathing vested remainder in favour of Class-I heirs of plaintiff?

3. Whether the impugned judgment calls for interference?

4. What order?

4. The relevant facts as found in the pleadings, evidence and findings recorded by the trial Court are as follows:

The plaintiff is the son of younger sister of defendant. Late S.R. Shankarnarayana Rao was the husband of defendant and he was the absolute owner of suit schedule property. Late S.R. Shankarnarayana Rao and defendant had no issues. The plaintiff styling himself as the adopted son of late S.R. Shankarnarayana Rao and defendant, filed a suit, inter alia contending that defendant has restricted rights under the registered will dated 05.04.1991 and sought for the aforesaid reliefs.

The plaintiff has also referred to proceedings in HRC No. 422/1999 and other legal proceedings, wherein the plaintiff has been described as the adopted son of late S.R. Shankarnarayana Rao.

The institution of instant suit had been preceded by exchange of two legal notices and two reply notices as per Ex.D.1 & Ex.D.2 and Ex.P.11 and Ex.P.12. The defendant has denied the plaintiff's averments. The defendant had caused reply notices as per Ex.D.2 and Ex.P.12, denying that plaintiff is the adopted son of late S.R. Shankarnarayana Rao and genuineness of the registered will dated 05.04.1991. The defendant reiterated the same in the written statement and sought for dismissal of the suit. The defendant has not only questioned the validity of adoption but also denied execution of registered will dated 05.04.1991 and contended that the will was not executed by late S.R. Shankarnarayana Rao; late S.R. Shankarnarayana Rao could not have created life estate in favour of defendant, who admittedly had pre-existing rights of maintenance, u/s 22 of the Hindu Adoptions and Maintenance Act, 1956 (for short, "the Act").

5. The learned trial Judge framed following issues:

ISSUE

4. Hindu Adoption and Maintenance Act

6. During trial, the plaintiff got himself examined as PW1. PW2-B.S. Sathyanarayana, who is alleged to have witnessed the adoption, which according to him took place on 06.05.1990. PW3-K. Omprakash Karanth and PW4-M. Sudheendra are alleged to be the attestors of will and PW5-K.V. Bachi Reddy is alleged to be the scribe of registered will dated 05.04.1991. The documents produced on behalf of plaintiff were marked as Ex.P.1 to Ex.P.16. The defendant did not adduce oral evidence. However, documents produced by defendant were

marked as Ex.D.1 & Ex.D.2.

7. The learned trial Judge on appreciation of oral and documentary evidence and also bearing in mind the principles of law regarding proof of factum of adoption, validity of adoption and principles of law governing the proof of will has held that the plaintiff has failed to prove the factum of adoption as also execution and attestation of registered will dated 05.04.1991.

8. Having heard the learned Counsel for parties and gone through the findings of trial Court, we find factum of adoption was not in issue in the pleadings. In fact, the plaintiff had let in evidence in proof of adoption on the premise proof of adoption was incidental to the proof of will. The learned trial Judge has answered issues 2 & 3 against the plaintiff.

9. On perusal of plaint, we find plaintiff has pleaded that he was the adopted son of late S.R. Shankarnarayana Rao and adoption took place during his childhood. The evidence of plaintiff would reveal that the plaintiff was born on 26.12.1957. The Plaintiff has sought to establish that there was yet another adoption on 06.05.1990. Therefore, two adoptions which the plaintiff had sought to establish had taken place after the advent of the Hindu Adoptions and Maintenance Act, 1956.

10. The plaintiff by examining PW2-B.S. Sathyanarayana has made an unsuccessful attempt to establish that plaintiff during his childhood was adopted by late S.R. Shankarnarayana Rao and his wife defendant. PW2 has deposed on a certain day during the Year 1968, adoption ceremony took place in the parental house of plaintiff. The father of plaintiff namely Yoganarasimha and mother of plaintiff namely Seethalakshmi gave the plaintiff in adoption to late S.R. Shankarnarayana Rao and defendant. At that time, necessary ceremonies including Datta Homa relating to adoption were performed and plaintiff was given in adoption. However, adoption deed was not drawn. At that time, plaintiff was studying in V or VI standard. During cross-examination, PW2 has deposed that he was not aware of the contents of plaint regarding adoption.

11. Incidentally it is necessary to state that PW2 is the brother-in-law of plaintiff. PW2 has deposed that he was not aware of the age of late S.R. Shankarnarayana Rao at the time of adoption. The father in-law of PW2 informed him that defendant and her husband, late S.R. Shankarnarayana Rao had requested him and his wife to give the plaintiff in adoption.

12. Before advertent to appreciation of evidence of PW2, it is necessary for us to state that the plaintiff is a B.Sc. graduate. Before institution of suit, there was exchange of not only one legal notice and one reply notice but two legal notices and two reply notices. The plaintiff has not pleaded that adoption took place in the year 1968 in his father's house and his father and mother physically handed over the plaintiff to late S.R. Shankarnarayana Rao and his wife (defendant) and late S.R. Shankarnarayana Rao and defendant accepted the plaintiff as their adopted son and such adoption ceremony was performed with the intention of

transferring the plaintiff from his natural family to the family of late S.R. Shankarnarayana Rao and defendant. The factum of giving the plaintiff in adoption by his natural father and mother and late S.R. Shankarnarayana Rao and defendant accepting the plaintiff as their adopted son is lacking in the evidence of PW2. It is needless to state even after codification of law relating to adoption, these are the essential ingredients to constitute a valid adoption. Therefore, we find evidence adduced by plaintiff in proof of his first adoption during his childhood which according to him had taken place during lifetime of his parents, is not based on pleadings. Even otherwise, the evidence of PW2 does not fulfill essential ingredients of valid adoption.

13. We also find from the evidence of plaintiff that after the date of alleged adoption, plaintiff had never lived in the house of late S.R. Shankarnarayana Rao and defendant. The plaintiff continued to live in the house of his parents. In the school records, the plaintiff is shown as the son of Yoganarasimha. Even in the driving licence held by plaintiff he is shown as son of Yoganarasimha (genitive father). In the year 2007, during renewal of his driving licence, plaintiff is shown as son of Yoganarasimha. That apart, plaintiff has not deposed that he had performed the obsequies after the death of late S.R. Shankarnarayana Rao.

14. PW2 has not deposed that the plaintiff had offered oblation water after the death of late S.R. Shankarnarayana Rao. The plaintiff has not performed annual death ceremonies of late S.R. Shankarnarayana Rao. The discharge of spiritual obligation is the primary purpose of adoption in customary law as also under the codified law. Therefore, the plaintiff has not proved the first adoption.

15. The plaintiff has contented on 06.05.1990 he was taken in adoption by late S.R. Shankarnarayana Rao and defendant for the second time. It had taken place a day prior to performance of his Upanayana. The plaintiff has relied on the contents of Ex.P.16-Dattu Sweekara Patra to prove that second adoption had taken place on 06.05.1990 and it was reduced to writing.

16. The plaintiff has not pleaded he was adopted for the second time on 06.05.1990 by late S.R. Shankarnarayana Rao and defendant. The learned Counsel for petitioner would submit that defendant herself had called upon plaintiff to produce document marked as Px.P.16 that had taken place on 06.05.1990. Therefore, the defendant has admitted the second adoption that had taken place on 06.05.1990.

17. In order to appreciate this submission, we have perused the application filed by the defendant under Order XVI Rule 7 CPC, calling upon the plaintiff to produce SSLC cumulative certificate or any other documents to prove that he was adopted by late S.R. Shankarnarayana Rao before 06.05.1990 and to produce alleged "Dattu Sweekara Patra" dated 06.05.1990. The defendant had called upon the plaintiff to substantiate factum of adoption pleaded by him. There is no unequivocal admission by defendant. The defendant has termed Ex.P.16 as alleged "Dattu Sweekara Patra".

Be that as it may, the so called adoption dated 06.05.1990 (Ex.P.16) does not further advance the case of plaintiff for the reasons stated hereinafter. The plaintiff could not have been adopted twice. The plaintiff has not pleaded that he was adopted by late S.R. Shankarnarayan Rao and defendant for the second time on 06.05.1990. The adoption for second time is unknown in law. The father and mother of plaintiff were not alive on 06.05.1990. The plaintiff was not given in adoption by his parents but by his elder brother and the wife of his elder brother, who were not competent to give plaintiff in adoption to late S.R. Shankarnarayan Rao and defendant, in terms of Section 9 of the Act. The plaintiff was aged about 33 years at the time of adoption. After codification of adoption law, a boy aged about 15 years cannot be given in adoption.

18. The learned Counsel for plaintiff relying on the decisions reported in *Josyam Parasuramayya Vs. Josyam Venkataramayya and Others*, , *Nanjegowda Vs. Channamma and Another*, and *Kondiba Rama Papal alias Shrike (dead) by his heirs and LRs and another Vs. Narayan Kondiba Papal*, would submit that though elder brother giving younger brother in adoption is invalid under Hindu Law, the defendant is estopped in view of categorical admission made by her husband late S.R. Shankaranarayana Rao in HRC No. 422/1999, wherein late S.R. Shankaranarayana Rao had sought for eviction of his tenant on the ground that premises was required to provide accommodation to his adopted son (plaintiff). The defendant had also joined the plaintiff in getting dismissal of O.S. No. 5837/1994. Therefore, the defendant is estopped from contending that adoption is invalid in law.

19. As already stated, we are dealing with the adoption, which according to the plaintiff took place after the advent of the Act, that too when he was aged about 33 years. Section 9 of the Act provides that natural father and mother alone are competent to give their son in adoption, in their absence, guardian as defined under explanation (i-a) Sub-section (5) of Section 9 of the act is competent to give in adoption. Therefore, the rule of estoppels cannot be pressed into service. Even otherwise from the pleadings and evidence we do not find that the plaintiff acting upon the alleged adoption has altered his position. In other words; plaintiff has not proved that he had inherited any property as a natural son and he disinherited the same consequent to alleged adoption.

The plaintiff has not been precluded from inheriting or succeeding to property of his parents, consequent to alleged adoption dated 06.05.1990.

20. On the other hand, we find the conduct of plaintiff was not consistent as that of an adopted son. After the demise of late S.R. Shankarnarayan Rao, plaintiff had not performed the obsequies of late S.R. Shankarnarayan Rao The plaintiff had not taken care of defendant or discharged any obligation as her adopted son. We also see from the recitals of the will dated 05.04.1991 the pious obligation was cast upon plaintiff to discharge the loans incurred by late S.R. Shankarnarayan Rao. From the evidence on record we do not find that the plaintiff had taken any pains to discharge the loans incurred by late S.R.

Shankarnarayan Rao. Above all, the plaintiff has not lived in the house of late S.R. Shankarnarayan Rao and defendant either during the lifetime or after death of late S.R. Shankarnarayan Rao. Therefore, the defendant is not estopped from contending that plaintiff has not proved the factum of adoption and that adoption is valid in law.

21. The learned Counsel for plaintiff relying on a judgment of this Court, reported in Nanjegowda Vs. Channamma and Another, , would submit that the custom of giving a boy aged inure than 15 years is a recognised custom in this part of the state.

22. The learned Counsel for plaintiff relying on the judgment of the Supreme Court reported in Kondiba Rama Papal alias Shrike (dead) by his heirs and LRs and another Vs. Narayan Kondiba Papal, , has contended that once the custom is judicially recognised, party relying on such custom is not required to be proved it independently.

23. In the decision reported in Nanjegowda Vs. Channamma and Another, , this Court has held "that it is now settled in all the provinces except Bombay that in the ease of three regenerative classes the adoption of a person is valid if made before upanayana and if he belongs to the sudra caste before marriage though in western India, however a man belonging to any of the four castes may be adopted at any age though he may have been married and has children."

24. In the case on hand, we are dealing with the adoption, which according to the plaintiff had taken place after the advent of the Act. The plaintiff has not pleaded custom. The plaintiff has not placed any evidence to show that people of his community practiced custom of giving and accepting a boy aged about more than 15 years in adoption contrary to the provisions contained in the Act.

25. Section 4 of the Hindu Adoptions and Maintenance Act, 1956 providing overriding effect of Act reads as hereunder:

4. Overriding effect of Act. -Save as otherwise expressly provided in this Act,

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

26. Section 10(4) of the Hindu Adoptions and Maintenance Act, 1956 reads as under:

10.(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

The law is fairly well settled that "Custom cannot override express law. Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it. Such custom must be ancient, uniform, peaceable continuous and compulsory in practice. Custom is not valid if it is illegal, immoral unreasonable or opposed to public policy. He who relies upon custom varying the general law must plead and prove it. Custom must be established by clear and unambiguous evidence."

27. In order to contend that there can be adoption of a boy aged about fifteen years, the parties relying on custom or usage applicable to the parties, which permits persons who have completed the age of fifteen years being taken in adoption, should establish the custom by clear and unambiguous evidence and such evidence must be founded on the pleadings. There should be clinching evidence to show that there is a custom or usage applicable to the parties.

28. In the case on hand, we do not find either. Therefore, what has been held in the decisions reported in Nanjegowda Vs. Channamma and Another, has no bearing on facts of the case.

29. The learned Counsel appearing for the plaintiff has strongly relied on the contents of eviction petition filed by late S.R. Shankarnarayan Rao in HRC No. 422/1999, to contend that late S.R. Shankarnarayan Rao had made a categorical and unequivocal admission that the plaintiff has been adopted by him and late S.R. Shankaranarayana Rao had sought to evict the tenant on the premise that the house was required to accommodate his adopted son (plaintiff).

30. We find there is no factual controversy on this aspect. However, the fact remains as to how far this admission could be treated as conclusive evidence in proof of adoption, alleged by the plaintiff.

31. We notice from the records, before initiating the HRC proceedings in HRC No. 422/1999, late S.R. Shankarnarayan Rao had caused a legal notice to the tenant wherein it is stated he required the premises to accommodate his son. However, in the petition filed u/s 21(h) of the Rent Control Act, it is stated that late S.R. Shankarnarayana Rao required the premises for accommodating his adopted son.

32. At this juncture, it is necessary to state that proceedings in HRC No 422/1999 were initiated during the year 1999. Assuming that the plaintiff was adopted in the year 1990 as admitted by late S.R. Shankarnarayana Rao, in view of the discussion made supra, wherein we have held that the evidence adduced by plaintiff is contrary to the provisions of Section 10(iv) of the Act, the admission made by late S.R. Shankarnarayana Rao and subsequent conduct of plaintiff the so-called adoption cannot be recognised as valid adoption in the eye of law. Apart from this, we have other reasons to reject this submission.

33. In terms of Section 10 of the Act, consent of both husband and wife is necessary to take a boy in adoption. In the case on hand, we do not find any admission on the part of the defendant to hold that she was a consenting party

to adoption.

34. The learned Counsel for plaintiff drawing our attention to the application filed by defendant under Order XVI Rule 7 CPC would submit that Ex.P.16 had in fact was summoned at the instance of defendant. In the discussion made supra, we have held that there is unequivocal reference to Ex.P.16, as alleged adoption deed (Dattu Sweekara Patra) dated 06.05.1990. Even otherwise, we have held that adoption under Ex.P. 16 is not an adoption in the eye of law. The statements made by late S.R. Shankarnarayana Rao in H.R.C. No. 422/1999 would not bind the defendant. The defendant's right to give consent for adoption was independent of right of her husband. It is not a situation where defendant was claiming her right through her husband. Therefore, by placing reliance on the so-called admission made in HRC No. 422/1999, it is not possible to hold that the plaintiff was adopted by late S.R. Shankarnarayan Rao and the defendant nor it can be said that the defendant is estopped from contending that there is no adoption and the adoption if any is invalid in the eye of law.

35. On careful analysis of the pleadings and evidence on record, we hold that the plaintiff has failed to prove alleged adoption and the alleged adoption is not valid in law. Therefore, we do not find any grounds to interference with the finding recorded by the learned trial Judge. Accordingly, we answer point No. 1 in negative.

Point No. 2:

36. It is the specific case of plaintiff that on 05.04.1991, late S.R. Shankarnarayana Rao executed a registered will (marked as Ex.P.13) in respect of suit schedule property, creating first life estate in favour of the defendant, after her death life estate in favour of plaintiff and bequeathing the vested remainder in favour of Class-I legal heirs of plaintiff.

37. Before advertng to appreciation of evidence adduced in proof of registered will dated 05.04.1991, we deem it proper to refer to the legal effect of the alleged will stated to have been executed by late S.R. Shankarnarayan Rao, creating life estate in favour of his wife - defendant. In this context, we would like to refer to Section 14 of the Hindu Succession Act, 1956, reading as under:

14. Property of a female Hindu to be her absolute property. - (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation. - In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately

before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument of the decree, order or award prescribe a restricted estate in such property.

38. It is not in dispute and cannot be disputed that defendant had pre existing right of maintenance in terms of Section 22 of the Act in the property held and left by late S.R. Shankarnarayan Rao.

39. The recitals in the will as they relate to life estate created in favour of defendant and the restrictive covenants are here under:

b) If I predecease my wife (there, in that event,) the entire property shall go to my said wife for her life and she shall be entitled to enjoy the usufructs of the property and deal with the property for such improvement, effective, management of the property. However, she shall not have the right of alienation, i.e., to alienate the property either fully or partly, in favour of any person whomsoever.

c) ...but he shall not have the right of alienation or disposal of the schedule property. After the life of the said adopted son Sri B.Y. Narasimha Prasad, the schedule property shall go absolutely to his heirs, coming within the description of Class-I in the Schedule to the Hindu Succession Act, 1956, who shall have absolute power to enjoy the schedule properties.

d) ...but he shall not have any right or power of alienation, or disposal of any part of the schedule property on his death, the property shall pass on absolutely to his heirs of the Class I in Schedule to the Hindu Succession Act, 1956.

40. From the above recitals, we find that late S.R. Shankarnarayan Rao had bequeathed the suit schedule property in favour of defendant for her maintenance, however with a restrictive covenant that she shall not have right of alienation in favour of whomsoever.

41. Therefore, the crucial point that would arise for determination is:

Whether the limited estate and nature of right held by the defendant in suit schedule property is governed by Section 14(1) or 14(2) of the Hindu Succession Act, 1956?

42. The law is fairly well settled that creation of life estate after the advent of the Hindu Succession Act, 1956 is abolished, subject to Section 14(2) of the Act. In terms of Section 14(1) of the Hindu Succession Act, 1956 any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner, subject to restrictions contained in Section 14(2) of the said Act.

43. The Supreme Court in the case of Gulwant Kaur and Another Vs. Mohinder Singh and Others, has held:

8-A. Shri Tarkunde particularly relied on the following passage in Bai Vajia (Dead) by Lrs. Vs. Thakorbhai Chelabhai and Others, at p. 1001:

A plain reading of Sub-section (1) makes it clear that the concerned Hindu female must have limited ownership in property, which limited ownership would get enlarged by the operation of that sub-section. If it was intended to enlarge any sort of a right which could in no sense be described as ownership, the expression "and not as a limited owner" would not have been used at all and becomes redundant, which is against the well-recognised principle of interpretation of statutes that the Legislature does not employ meaningless language.

We do not understand the court as laying down that what was enlarged by Sub-section (1) of Section 14 into a full estate was the Hindu woman's estate known to Hindu law. When the court uses the word "limited estate" the words are used to connote a right in the property to which the possession of the female Hindu may be legitimately traced, but which is not a full right of ownership. If a female Hindu is put in possession of property pursuant to or in recognition of a right to maintenance, it cannot be denied that she has acquired a limited right or interest in the property and once that position is accepted, it follows that the right gets enlarged to full ownership u/s 14(1) of the Act. That seems to us to follow clearly from the language of Section 14(1) of the Act.

44. The Supreme Court in the case of C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Others, has held Section 14(2) of the Hindu Succession Act would operate if the property is acquired for the first time without there being any pre existing right. If property is acquired in lieu of pre existing right, provisions of Section 14(1) of the Act would govern the rights of parties.

45. In the case on hand, it is not in dispute and cannot be disputed that the defendant had pre existing right in terms of Section 22 of Hindu Adoptions and Maintenance Act. The suit schedule property was the only property held by late S.R. Shankarnarayana Rao which has been given to defendant for her maintenance, however with a restrictive covenant. In view of the provisions contained in Section 14(1) & 14(2) of the Hindu Succession Act and also in view of what has been held by the Supreme Court in the aforesaid judgments we hold that restrictive covenants cannot operate and defendant is entitled to own the suit schedule property as absolute owner in terms of Section 14(1) of the Hindu Succession Act.

46. Before advertng to the evidence placed in proof of due execution and attestation of will dated 05.04.1991, it is necessary to state certain facts relating to the custody of the will and conduct of the plaintiff, which are suspicious in nature. From the contents of the will we find immediate beneficiary under the will

is the defendant, who has been conferred life estate with a restrictive covenant of non-alienation. In the normal circumstance one would expect the defendant would be custodian of the will. If for any reason the plaintiff had come into possession of the will, he should have brought to the notice of defendant about execution of will and handed over the will to the custody of defendant, immediately after the death of late S.R. Shankarnarayana Rao, to manifest the intention of plaintiff to give effect to the intention of the testator. On the other hand, we find the plaintiff was in the custody of the will. The existence and contents of the will were not made known to the defendant immediately after the death of late S.R. Shankarnarayana Rao.

47. From the records, we find that the plaintiff had made an application under Order XXII Rule 3 C.P.C., to come on record along with the defendant as legal representatives of late S.R. Shankarnarayana Rao in HRC No. 422/1999. It is proved from the death certificate, S.R. Shankarnarayana Rao. died on 01.10.2000. In the affidavit annexed to the application on 17.10.2000, the plaintiff has described himself as the son of late S.R. Shankarnarayana Rao and defendant; plaintiff and defendant are Class-I legal heirs and plaintiff is the adopted son of late S.R. Shankarnarayana Rao and defendant.

48. The plaintiff was aware of the contents of the will and creation of first life estate in favour of defendant and he had no business to meddle with the suit schedule property. The very affidavit filed by the plaintiff would demonstrate that plaintiff has tried to meddle with the suit schedule property contrary to the recitals of the will. The conduct of plaintiff is not normal.

49. The learned Counsel for plaintiff would submit that the defendant had also filed vakalath in HRC No. 422/1999. However, we find that the defendant had withdrawn her vakalath. The plaintiff and defendant had raised inter se dispute as to their rights to represent the estate of late S.R. Shankarnarayana Rao in HRC No. 422/1999, which in our considered opinion was not relevant in an eviction petition. Therefore, the fact that defendant had filed vakalath along with plaintiff does not lead to an inference that will propounded by the plaintiff had been accepted by defendant. Above all, there is no reference to the will in the affidavit dated 17.10.2000. We make a specific reference to this fact as it was the earliest opportunity for the plaintiff to press the will into service, if he had any intention to give effect to the intention of the testator and to remove the suspicious circumstance regarding custody of will.

50. The learned Counsel for plaintiff has also relied on Ex.P7-Plaintiff's memo dated 28.05.2001. On perusal of the memo, we do not find any circumstance in favour of plaintiff or against the defendant. We also find from the records that defendant had filed an affidavit, disowning her relationship with plaintiff and her reluctance to prosecute HRC No. 422/1999. We find the plaintiff for the reasons best known to him had withheld the will and he had not made honest efforts to give effect to the will.

51. As already stated, in terms of the will, defendant is the immediate beneficiary, under the will and defendant was also entitled to certain jewels and moveables held and left by the testator. The evidence on record does not indicate whether jewels were given to the defendant in terms of the will. The plaintiff has not offered any explanation for being custodian of will and non-production of will in HRC No. 422/1999. We also find from the conduct of plaintiff that he was aware of proceedings in HRC No. 422/1999; plaintiff was aware that defendant was the immediate beneficiary under the will and he should not have withheld the will to represent the estate of late S.R. Shankaranarayana Rao during the lifetime of defendant, even then the plaintiff filed an application under Order XXII Rule 3 C.P.C., to come on record, describing him as adopted son of late S.R. Shankarnarayana Rao. This again is a suspicious circumstance. Bearing in mind the suspicious circumstances and conduct of plaintiff we proceed to appreciate evidence let in by the plaintiff in proof of execution and attestation of the will.

52. The plaintiff has examined PW3-K.Omprakash Karanth and PW4-M.Sudheendra, who are stated to be attestors of will dated 05.04.1991 marked as Ex.P.13. The plaintiff has examined PW5-K.V. Bachi Reddy, who is stated to be the scribe of will.

53. We find from the records that the plaintiff had obtained an ex parte ad interim order of temporary injunction during pendency of the suit. At that juncture, plaintiff had filed affidavits of PWs.3 & 4, wherein they have testified that they have not seen execution of will by late S.R. Shankarnarayana Rao. These affidavits are marked as Ex.P.17 & Ex.P.18. PW3 did not support the case of plaintiff. In the examination-in- chief, apart from identifying his signature on the will, PW3 has denied execution of will by late S.R. Shankaranarayana Rao. He has also denied the attestation of will.

54. The learned Counsel for plaintiff was permitted to cross-examine PW3 on the ground that PW3 had turned hostile. During cross-examination, PW3 has denied that he had attested the will under the circumstances stated in the will. PW3 has deposed that late S.R. Shankarnarayana Rao had come to his house and obtained his signature on the will.

55. The same is the situation with PW4-M. Sudheendra. PW4 had also filed an affidavit on 24.02.2006, marked as Ex.P. 18. The sum and substance of the affidavit is that; he had not seen execution of will; PW4 does not know the contents of the will nor he had seen the will. PW4 did not support the case of plaintiff and he was treated as a hostile witness. During cross-examination, PW4 has identified his signature found on the affidavit marked as Ex.P.18. PW4 has denied the suggestion that late S.R. Shankarnarayana Rao had affixed his signature in his presence. PW4 has denied suggestion that PW3 & PW4 affixed their signatures as witnesses to the execution of will.

56. The learned Counsel for plaintiff, relying on a decision reported in AIR 2000 SC 210 (in the case of Koli Lakhmanbhai Chanabhai v. State of Gujarat) would

submit that the evidence of hostile witness does not get obliterated and evidence of witness to the extent it supports the case of prosecution could be relied upon.

57. Section 154 of the Indian Evidence Act, 1872 which deals with the present situation, reads as under:

154. Question by party to his own witness

The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

In the decision reported in AIR 2000 SC 210 (in the case of Koli Lakhmanbhai Chanabhai v. State of Gujarat), it is held:

5. ...It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record.

From the cross-examination of PW3 & PW4 we do not find any suggestion that these witnesses had attested the will having seen late S.R. Shankarnarayana Rao, affixing his signature to the will as his last testament. Therefore, from cross-examination of PW3 & PW4 we do not find any evidence, which is useful to plaintiff to prove due execution and attestation of will. We have considered the evidence of PW3 & PW4 with reference to the contents of will marked as Ex.P.13 and also with reference to the evidence of PW5-K.V. Bachi Reddy, scribe of the will.

58. From the evidence of PW5, we find will was not prepared, executed and attested on the same day. PW5 has deposed: on 01.04.1991, late S.R. Shankarnarayana Rao came with written information on a paper to his office and asked him to draft a will. As per the instructions of late S.R. Shankarnarayana Rao, PW5 prepared a draft will and got it typewritten on 01.04.1991. Late S.R. Shankarnarayana Rao on the next day i.e., on 02.04.1991, went through the draft will and approved the same. On 03.04.1991 Late S.R. Shankarnarayana Rao had brought the names and addresses of two witnesses. PW5 got incorporated the same in the will. On 05.04.1991, late S.R. Shankarnarayana Rao came along with two witnesses and another person. PW5 read over the contents of will to late S.R. Shankarnarayana Rao. The witnesses and late S.R. Shankarnarayana Rao affixed their signatures to the will. The witnesses left his office; PW5, late S.R. Shankarnarayana Rao and another person went to the Office of the Sub-Registrar.

59. From the evidence of PW5, we find on 01.04.1991, late S.R. Shankarnarayana Rao had gone to the office of PW5. At this juncture it is necessary for us to state that the evidence of PW5 does not indicate that PW5 had any acquaintance with late S.R. Shankarnarayana Rao. He was not his client not he had been introduced to PW5 by some person known to PW5. On 02.04.1991, late S.R. Shankarnarayana Rao went through the draft will and approved the same. On 03.04.1991 late S.R. Shankarnarayana Rao had brought

the names and addresses of two witnesses. The names of two witnesses, were incorporated in the will by PW5. From the evidence of PW5, it is clear the names of these witnesses had been incorporated even before they had signed the will. We make specific reference to this part of deposition in view of unusual nature and manner in which the document was prepared. The will bears the signatures of two witnesses namely PW3 & PW4. Thereafter, PW3 & PW4 have made affirmation reading as under:

We Sri M. Sudhindra and Sri K. Omprakash Karanth both of us residents of Bangalore, having been required by the above said Executant/Testator Sri S.R. Shankaranarayana RAO, to be the attesting witnesses hereto, both of us having actually seen and witnessed the said Testator put his signature on this document and on his admitting before us that this is his LAST WILL, and we, at his request and in the presence of each of us do hereby sign, and affix our respective signatures as attesting witnesses simultaneously on this the 5th day of April 1991.

60. The law is fairly well settled that the will has to be duly signed by the testator and attested by two witnesses. The further affirmation of will by attesting witnesses looms large in view of the evidence of PW3 to PW5. PW5 had put in practice of eight years. Thus, evidence of PW5 and the contents of Ex.P.13, to some extent, would lend corroboration to evidence of PW3 & PW4 that late S.R. Shankarnarayana Rao had brought the will and they had affixed their signatures to the will as requested by late S.R. Shankaranarayana Rao and they had not seen execution of will. Apart from this, the evidence of PW5 who had prepared the will as per the instructions of late S.R. Shankarnarayana Rao regarding execution and attestation of will is as vague as it could be. PW5 has deposed that on 05.04.1991, late S.R. Shankarnarayana Rao had come to his office along with two witnesses and another person. PW5 read over the contents of will and late S.R. Shankarnarayana Rao and two witnesses had affixed their signatures to the will. PW5 is an Advocate; he had rendered his professional services to late S.R. Shankaranarayana Rao. There are no reasons to hold that PW5 was not aware of the consequences of his evidence. As per evidence of PW5 there is ambiguity in the execution and attestation of the will as to whether at the first instance witnesses had affixed their signatures to the will and thereafter late S.R. Shankarnarayana Rao affixed his signature to the will or all of them had simultaneously affixed their signatures to the will. In either event this evidence of PW5 is hardly sufficient to prove execution and attestation of the will.

61. PW5 has deposed that he had gone to the office of Sub-Registrar along with late S.R. Shankarnarayana Rao and presented the will for registration at 11.10 a.m. or 11.45 a.m., on 05.04.1991. S.R. Shankarnarayana Rao and PW5 presented the will for registration at about 11.10 a.m. or 11.15 am; PW5 completed the registration and late S.R. Shankarnarayana Rao affixed his signatures to all the pages of the will. However, from the contents of the will we find late S.R. Shankarnarayana Rao had presented the will. PW5 had not

identified late S.R. Shankarnarayana Rao before the Sub-Registrar. On the other hand one J.B. Satish had identified the signatures of late S.R. Shankarnarayana Rao in the office of the Sub-Registrar. In cross-examination, PW5 has deposed that he does not know the name of the person who had identified the signature of late S.R. Shankaranarayana Rao. From the contents of the will we find that one J.B. Satisha had identified late S.R. Shankaranarayana Rao at the time of registration of the will. PW5 has denied suggestion that since PW3 and PW4 have not attested the will, one J.B. Satish had identified the signatures of late S.R. Shankaranarayana Rao at the time of registration of will.

62. PW5 has deposed that he had prepared the will. From the contents of the will we find that PW5 has made an endorsement at the end of the document after attesting witnesses have affixed their signatures to the will by making a solemn affirmation. We find the concluding part of the will is at page No. 5. In the normal course, a will is concluded by the testator affixing his signature or thumb impression to will acknowledging the same as his last testament and witnesses attesting the document having seen the testator affixing his signature to will as his last testament or after receiving acknowledgement of execution of will by the testator.

63. Thus, we find from the contents of will and evidence of PW3 to PW5, the plaintiff has not placed satisfactory evidence in proof of due execution and attestation of will.

64. The learned Counsel for plaintiff relying on the decisions reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, , Satipada Chatterjee Vs. Annakali Debya, , Gurdev Kaur and Others Vs. Kaki and Others, , Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, and Vidhyadhar Vs. Manikrao and Another, has made following submissions:

I. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstance, elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence.

II. Even if the evidence of attesting witnesses was not specific but vague. Court has to take into consideration the surrounding circumstances into account.

III. If a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statute a presumption of due execution and attestation applies.

IV. Identification of testator before the Sub-Registrar by an Advocate is not a suspicious circumstance.

V. The defendant having denied execution of the will has not entered the witness box. Therefore, an adverse inference u/s 44 of the Indian Evidence Act, 1872 has to be drawn against the defendant.

65. On consideration of the above submissions with reference to decisions cited supra, we find in the decision reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, , the preparation and execution of will was completed in a single sitting. Therefore, the failure of attesting witnesses to state in the examination-in-chief that testator had signed the will in their presence do not detract their credibility.

66. In a decision reported in Satipada Chatterjee Vs. Annakali Debya, , it is held in cases where the evidence of the attesting witnesses is not specific but vague or doubtful or even where it is conflicting upon the same material facts, the Court may take into account the surrounding circumstances of the cases and judge from the same, whether the requirements of the statute have been complied with.

67. In the discussion made supra, we have considered the evidence of PW3 and PW4 not only in the context of their evidence before the Court but also taking into consideration the evidence of PW5 and contents of the will.

68. In a decision reported in Gurdev Kaur and Others Vs. Kaki and Others, in para 79, it

79. If a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statute a presumption of due execution and attestation applies.

69. On careful consideration of the aforestated decision, we find at paragraph 18 of the judgment, it is held "that requirement of law is that the testator should put his mark on the will in the presence of the attesting witnesses and the attesting witnesses should attest the will in the presence of the testator."

70. In the above decision, having regard to the evidence of DW1, the testator had affixed his signature in the presence of attesting witnesses, it is held there is proof of execution and attestation of will.

In the case on hand, there is no evidence in proof of due execution and attestation of will.

71. On consideration of decision reported in Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, , what has been held in the said judgment is not applicable to the present case.

72. The learned Counsel for the plaintiff, relying on a decision reported in Vidhyadhar Vs. Manikrao and Another, , had contended that adverse inference has to be drawn against the defendant for not stepping into the witness box.

73. The burden of proof was cast on the plaintiff. The defendant had not set out any special circumstance. Therefore, adverse inference cannot be drawn against the defendant. We cannot find fault with the defendant for not entering into the witness box.

74. The learned Counsel for defendant has contended that in view of failure of the plaintiff to prove that he was the adopted son of late S.R. Shankarnarayana Rao, will dated 05.04.1991 made on the premise that the plaintiff is the adopted son of testator should fail. In support of this contention, learned Counsel for defendant has relied on a decision reported in Siddaramappa and Others Vs. Smt. Gouravva, .

75. The learned Counsel for the defendant, relying on the judgment of the Supreme Court, reported in Yelamanchilisa Panchakshamma Godavaru Vs. Yalamanchili Cheva Abhayi and Others, , would submit that when disposition of properties to the plaintiff is as a persona designata or by reason of his fulfilling a particular legal status, namely, the adopted son of the testator, notwithstanding the fact that plaintiff has failed to prove his adoption testament shall be given effect to.

76. In the discussion made supra, we have held that the plaintiff has failed to prove that he was the adopted son of late S.R. Shankarnarayana Rao and defendant. Therefore, there is nothing for us to consider this submission. The plaintiff has failed to prove due execution and attestation of will. Therefore, examination of the will as to whether plaintiff would be entitled to benefit of the will does not arise for consideration. Therefore, we answer point No. 2 in the negative. The learned trial Judge on proper appreciation of evidence has dismissed the suit. Therefore, we do not find any grounds to interfere with the impugned judgment.

77. In the result, we pass the following:

ORDER

The appeal is dismissed with costs.

78. After the judgment was dictated, Sri A. Madhusudhana Rao, learned Counsel appearing for the appellant/plaintiff has made an oral request for restraining the defendant from alienating the suit schedule property, etc., pointing out that there was stay of operation and execution of the impugned decree throughout the proceedings and the appellant had enjoyed the benefit of an order of status quo. Therefore the plaintiff be provided the benefit of an order of status quo for a period of two months to enable the plaintiff to challenge the order made in this appeal, before the Supreme Court of India.

79. Sri K. Giridhar, learned Counsel appearing for the respondent/defendant vehemently opposes the submission, by pointing out that the order of status quo had been given initially only on the prima facie material, etc. and even before this Court it has been continued all along, only on such premise and not on a further examination of the merits of the appeal.

80. In view of the concurrent findings of the trial court and this Court, which are against plaintiff, an order of status quo as sought for cannot be granted.

81. We have elaborately considered the factual and legal position and we have found that the appellant has not made out a case of factum of adoption or due execution and attestation of will. On the other hand, legal position is also against the plaintiff, who asserts his right even in terms of covenant of the will namely life estate in favour of defendant, thereafter life estate in favour of the plaintiff and subsequently in favour of Class-I legal heirs of plaintiff. When once we have found that the will is not made good, we cannot permit the plaintiff to have a benefit contrary to the finding, and on a premise not found in favour of the plaintiff, either on the basis of adoption or on the basis of due execution and attestation of the will.

82. The plaintiff having failed on both grounds and we having dismissed the appeal, we do not find this is a fit case for grant of an order of stay of an order or to restrain the defendant in any manner contrary to the provisions of law.

83. Accordingly, the oral request for an order of stay or an interim order as had been granted and was in vogue during the pendency of the appeal cannot be continued in favour of the appellant even thereafter, in the wake of the intended appeal to the Supreme Court, by the appellant and the request for the same is rejected.