

(2009) 12 KAR CK 0075

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 7502 of 2003

Sri. P.N. Balakrishna Gowda and Others

APPELLANT

Vs

Sri. H.B. Bhavani Shankar, Sri P.N. Ramakrishna Gowda, Smt.
P.N. Suguna and Smt. P.N. Sunanda

RESPONDENT

Date of Decision : 08-12-2009

Acts Referred:

Succession Act, 1925 — Section 59, 63

Citation : (2009) 12 KAR CK 0075

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : Y.K. Narayana Sharma, for the Appellant; A.G. Shivanna, for C/R.1, R.2, 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

Subhash B. Adi, J.—This appeal is by the defendant Nos. 1, 3, 5, 7, 8, 9 and 10 against the judgment and decree in O.S. No. 2160/1998 dated 7.8.2003 on the file of XXXI Addl. City Civil Judge, Bangalore.

2. Parties will be referred to as per their ranking in the trial court.

3. Plaintiff filed P & SC No. 49/1992 for issue of certificate of probate interalia alleging that. P. Nagappa, father-in-law of the plaintiff died on 13.12.1990. He had executed a registered Will dated 15.3.1989 bequeathing his self-acquired property in favour of his beneficiaries under the Will. Defendants-1, 3 and 5 filed their statement admitting the relationship and death of P. Nagappa - the testator, however, denied the execution of Will dated 4.1.1989 and alleged that it is a fabricated and fraudulent document.

4. Before the trial court, plaintiff got himself examined as PW-1. He also examined PW-2, the attesting witness to the Will. On behalf of the defendants, defendant No. 3 was examined as DW-1. In the evidence of plaintiff and defendants. Exs.P1 and P2 and Exs.D1 to D7 were marked. The trial court relying

on the evidence of the parties found that the plaintiff has proved the Will, and decreed the suit inter alia issuing probate certificate in favour of the plaintiff. As against the said judgment and decree, this appeal has been filed.

5. Sri. Narayana Sharma, learned Counsel appearing for the appellants submitted that, testator P. Nagappa had two sons and eight daughters. From amongst the children, he had bequeathed his property only in favour of his grand-son Santhosh, s/o Ramakrishna: one Yogesh, s/o Sunanda - his (testator's) second daughter; Shashikiran, son of Suguna, his another daughter and some properties are bequeathed in favour of his wife Jakamma and all other heirs have been left out. At the time of alleged execution of Will, testator was not hale and healthy, his eye-sight was not clear and though the testator was a permanent resident of Guddehosur in Madikeri district, Will has been executed at Bangalore on 4.1.1989 and was registered on 15.3.1989 and the plaintiff has been appointed as an Executor, these circumstances show that, the said Will has come into existence at the instance of plaintiff.

6. The attester to the Will PW-2 is none other than a co-employee with the plaintiff working in B.E.L. factory. The major portion of the properties are bequeathed in favour of the son of the plaintiff. Though the Will is executed at the residence of one Janardhan, Janardhan has not been examined. Another attesting witness though available has also not been examined.

7. He also submitted that, it has come in the evidence that testator was admitted to the hospital for the purpose of eye operation. He also submitted that, PW-1 totally pleads ignorance as regards to the admission of the testator to the hospital at Bangalore. PW-1 goes to the extent of stating that he had not gone to the hospital to see his ailing father-in-law (testator) and submitted that the evidence of the PW-1 is not trustworthy and not acceptable. He relied on the evidence of PW-2 and pointed out that. PW-2 admits that, he does not know who is Janardhan, however, he goes to the house of Janardhan. PW-2 admits that, he had not read the contents of the Will. In view of the relationship of PWs-1 and 2, being working in the same factory and further, PW-2 was not known to the testator, except alleging that, he was visiting the house of PW-1, in such circumstances, the evidence of PW-2 is doubtful and no credibility could be attached to the said evidence.

8. He also relied on the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, and submitted that, in order to dispose of the property by testamentary document the testator must be sound, healthy and capable of executing the Will, if the will has been executed when the testator was not in sound state of mind, such a execution does not amount to executing the free will. It does not amount to testamentary disposal of the property by the testator.

9. He further submitted that the will is not free from suspicious circumstances. In this regard, he pointed out the following circumstances:

- (i) Though the testator was a permanent resident of Goddehosur, the Will is executed at Bangalore.
- (ii) Though Will is dated 4.1.1989, but same is registered in March 1989.
- (iii) Testator had 8 daughters and 2 sons, only in respect of children of one son and two daughters, the properties are distributed.
- (iv) Testator was not in sound state of mind at the time of execution of Will.
- (v) PW-2 attester is a friend of PW1, who is appointed as Executor.
- (vi) The will executed in the house of Janardhan, however, Janardhan is neither an attester nor is examined as witness.
- (vii) Janardhan is not known to the PW2.

These are the serious suspicious circumstances shrouded under the Will. Once it is pointed out that the Will is not free Will and it has come in to existence under a suspicious circumstance, the onus is on the plaintiff to remove such suspicious circumstances by leading cogent evidence. However, the plaintiff has not led any evidence except the evidence of one of the attesting witnesses. There is no explanation as to why the other attesting witness or scribe or Janardhan at whose residence the Will was executed were examined. In view of these suspicious circumstances, the Will is not free from doubt and in such circumstances, the court should not have issued certificate of probate on the basis of the only evidence of PW-2 to hold that the Will is proved. In this regard, he also pointed out from the cross-examination of PW-2 wherein, PW-2 has admitted that he is friend of PW-1 and has also admitted that, he had seen testator Nagappa only 10 to 15 times at the residence of plaintiff and further, he admits that, he had not read the Will and was not aware of the contents of the Will and he does not know as to who is Janardhan, as to why he has not signed the Will. He further submitted that, DW-1 has specifically alleged that the Will is not executed and it is a fabricated document, it has come into existence at the instance of the plaintiff, Despite these serious lapses and suspicious circumstances shrouded around the will and there being no evidence removing these doubts, there was no reason for the trial court to grant certificate of probate.

10. Learned Counsel relied on the judgment of the Apex Court reported in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and submitted that, if it is proved that the Will is not a free will and has come into existence under suspicious circumstances, unless the propounder remove such suspicious circumstances by leading reliable evidence, the will cannot be held to be proved. He also relied on another decision of Division Bench of this Court reported in Virupakshappa Malleshappa Sanklapur and Others Vs. Akkamahadevi and Others, and submitted that, this Court: has observed that, in case of doubtful evidence of only attester, is not safe to rely to prove the will. He also relied on another judgment; reported in Janki Narayan Bhoir Vs. Narayan Namdeo Kadam,

and submitted that, when one attesting witness fails to prove the execution of the Will, the other attesting witness should have been examined and further submitted that, for non-examination of another attesting witness, the court should have drawn an adverse inference. In this regard, he also relied on another judgment of the Apex Court reported in Vidhyadhar Vs. Manikrao and Another, and submitted that the trial court quite contrary to the settled principle has erroneously decreed the suit and issued the probate certificate in favour of the plaintiff.

11. On the other hand, Sri. A.G. Shivanna, learned Counsel appearing for the plaintiff - respondent No. 1 submitted that, PW-1 in his evidence has categorically stated that, he never participated nor he was aware of the execution of the Will. Even though he has been cross-examined, nothing has been elicited to show that he had participated in the execution of the Will. As far as the execution of the Will is concerned, he submitted that, the Will is executed on 4.1.1989 and same is registered before the Sub-Registrar on 15.3.1989. Will by itself speaks the intention of the testator, wherein the testator has categorically stated, as to why he is bequeathing the property in favour some of his grand children. In this regard, he read the entire Will and pointed out. that, from amongst 8 daughters, only two daughters were not financially supported by the testator and in respect of other daughters, the testator in the will itself has stated that he has given sufficient financial support, As far as grandson i.e., son of Ramakrishna, testator has stated that he had special love and affection.

12. As far as requirement of law is concerned, the will is signed and attested by two witnesses in addition to the signature of the scribe. The Will is executed as required u/s 63 of Indian Succession Act. Testator has put his signature at proper place including the places where the corrections are made, attestors have seen the testator reading the will and affixing his signature and they signing thereafter. As required u/s 68 of the Evidence Act, one attesting witness has been examined as PW-2. PW-2 in his evidence has categorically stated that, the testator read over the Will, affixed his signature and he saw the testator affixing his signature on the Will and thereafter he put his signature and another attesting witness also put his signature, he has identified his signature, testator's signature and also the signature of another attesting witness. He also submitted that, the testator was not. an illiterate, he was worldly wise and he clearly knew what he was doing, in addition to this, the will was registered during his lifetime. He has not only signed the will, but he has put his thumb mark before the Sub-Registrar, in these circumstances, there cannot be any circumstances to doubt: the proper execution of the will. When the evidence prove that the will is properly executed and has been proved by adducing the evidence of the attesting witness, there is clear compliance of the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act.

13. As far as the sound disposal state of mind of the testator is concerned, he submitted that, the Will was executed on 4.1.1989, as on the said date, the

testator was hale and healthy and it. is clear from the proceedings in O.S. No. 282/1989, a suit filed by the testator himself. In this regard, he relied on Ex.D1 and pointed out that, the testator questioned the sale deed alleged to have been executed by him in favour of DW-1 and the said suit was filed on 25.10.1988. Testator has appeared in the suit and has given evidence against the D.W.1 on 3.3.1990, he was also subjected to cross-examination by D.W.I in the said suit. He further submitted that, merely because PW-1 has not gone to the hospital when the testator was admitted in December 1990, that has no bearing on the execution of the will".. PW-1 has stated that he was not aware of the Will till he received a registered post from the Sub-Registrar's office containing the Will, which he gave it to deceased Nagappa, He relied on the cross-examination of DW-1 and submitted that, DW-1 has slated that he came to know of the execution of the Will in July or August 1989 itself and he also admits that, the testator was alive till December 1990. However, at no point of time, either he has informed the testator or has taken any steps to question the said Will. In turn, alter the demise of the testator when the probate was sought, he filed objections. As regard to the health condition of the testator and sound disposal state of mind of the testator is concerned, he relied on Ex.D-1. and submitted that, much after the execution of the will, testator not only got the same registered, but he participated in the court proceedings and has given evidence. This clearly establishes the perfect state of mind of the testator. He submitted that, one who is capable of attending court: proceeding and giving evidence in his own case prove beyond reasonable doubt that the testator was quite aware of what he was doing. Testator lived about more than 1 year 11 months after the execution of the will, and at any point of time, he had raised any objection against the said will as even according to D.W.I, he came to know of the execution of the will in July/August 1989, if he had not executed will or it. was under somebody's pressure, definitely he would have taken some steps against the same. In turn, to prove his sound mental capacity, after the execution of the will, he had given evidence, this proves the soundness of his mind and execution of free will.

14. Learned Counsel in support of his contention relied on the judgments of the Apex Court reported in 2005(1) KCCR 5 in the matter of Meenakshiammal (dead) through Lrs and Ors. v. Chandrasekaran and Anr. and submitted that, the onus of proving the Will is on the propounder in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, is sufficient to discharge the onus. In this case, he submitted that, though the allegations are made in the written statement that the testator has not executed the Will, the allegations are made that his health condition was not good and he was not hale and healthy at the time of execution of the Will, same is not supported by any material or evidence and unless the defendants show that the Will was surrounded by suspicious circumstances, mere allegation itself will not take the place of proof unless some material particulars are placed before the court.

15. As far as examination of one of the attesting witnesses is concerned, he submitted that, the requirement of law has been complied with and in similar circumstances, the Delhi High Court in a case reported in Mathew Jacob Vs. Ms. Salestine Jacob and another, has held that, to prove the Will, it is sufficient if one of the attesting witnesses is examined in terms of Section 68 of the Indian Evidence Act. He also relied on the judgment of Himachal Pradesh High Court reported in Shakuntala Devi Vs. Savitri Devi and Others, and submitted that, merely because the other heirs are excluded, that itself is not sufficient to hold that the will is shrouded with suspicious circumstances, unless it is pointed out that, the Will has not come in the natural course in normal circumstances and is pointed out that, there was no reason for the testator to exclude the other heirs of the testator.

16. In the light of the above contentions, the points that arise for consideration are:

1. As to what are the requirements to prove the will?
2. Whether the Will is proved in this case?

17. "Will" is defined u/s 2 Clause (h) of the Indian Succession Act. which means as under:

2(h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

Under Section 59 of the Succession Act, every person of sound mind not being a minor may dispose of his property by Will. What emerges from Section 59 is that, a person must be of sound mind and must not be a minor. Sound state of mind as to whether the testator is capable of understanding as to what he is doing, whether he can freely dispose of his property by his testamentary document; whether with his free mind and according to his intention is disposing the property? The law in order to protect the interest of the testator, who will not be there, when the will is enforced, has put safeguards in case of disputes by requiring the propounder to prove the will in terms of Section 63 of the Indian Succession Act, wherein it requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. Either the signature of the testator or the signature put by a person at his instance and in his presence on the Will and such signature must be at a place, which shall appear that testator intended thereby to give effect to the writing as a Will. In addition to this, Will requires to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will and has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that, more than one witness be present at the same time and no particular form of attestation shall be necessary.

18. From the reading of Section 63 of the Indian Succession Act, it is clear that, to prove the execution of the Will, it must be signed by the testator or signed by a person at the direction and in the presence of the testator and must be attested by two witnesses and each of witnesses shall sign the Will in the presence of the testator. As far as this case is concerned, the Will is signed by the testator and is signed at a proper place to show the intention of the testator to give effect to the same. Further to evidence the same, the testator has taken care to sign at all places where the corrections are made in the will, two attesting witnesses have signed the will. One of them is examined as PW2, further signature of scribe is also taken. This evidence proves the requirement of Section 63 of Indian Succession Act and Section 68 of the Evidence Act. The document, which requires compulsory attestation, to prove the execution of document, one of the attesting witnesses is called for the purpose of proving the execution of the document. In view of the provisions of Section 68 of the Evidence Act read with Section 63 of the Succession Act, law requires the examination of attesting witness to prove the Will and in this case, it is also not in dispute that one of the attesting witnesses has been examined.

19. However, it is argued that the will is not free from suspicious circumstances. In the case of H. Venkatachala Iyengar (supra), the Apex Court while considering the proof of execution of the Will has considered the legal position in the matter of proof of the Will. The party propounding a Will or otherwise making a claim under a Will is required to prove a document and to prove the document, inevitably the Court is required to refer to the statutory provisions of Sections 67 and 68 of the Evidence Act. In case if there is a dispute as regard to the signature, the signature of the said person, must be proved to be in his handwriting and to prove the handwriting, the Court may record the expert opinion under Sections 45 and 47 of the Indian Evidence Act. In this case, there is no such situation as regard to the proof of the signature, as it is not disputed except a bald denial of the execution. Since the Will comes into effect after the demise of the testator, when it is propounded or produced before a Court, the testator who has already departed the world and not available to say, whether he has executed the Will or not, the Court is required to take great care and caution in the matter of proof of Will to find out as to whether the testamentary document is the last Will of the testator and the proof of the said document. Ordinarily when there is an evidence of the party, who is disinterested and his evidence is satisfactory and sufficient to prove the sound and disposing state of mind of the testator, the Courts would be justified in giving a finding in favour of the propounder. However, if the contesting party raises an objection as regards to the execution of the Will and produces evidence as regard to suspicious circumstances shrouded around the execution of the will, if there are suspicious circumstances then the propounder must lead such evidence, which remove the doubt or the suspicious circumstances and clear the cloud.

20. One thing must be kept in mind, that testamentary documents are executed at the advance age, testator intends to dispose of his property according to his

intention, the testamentary document comes into effect only after the testator's demise, his intention has to be gathered from the document and the surrounding circumstances existed when it was executed. In case there is no dispute and the will is in consonance with the requirement of Section 63 of the Indian Succession Act, it is sufficient. But when the Will is disputed, then the question arises of proof of the same. This is not a case where the testator was on death bed, not a case where the testator was suffering from any disease, admittedly, in this case, after the execution of the Will on 4.1.1989, the testator has entered into the witness box before the Court in March 1990 i.e., nearly after one year two months and to prove that, in between the execution of will and deposing before the court, he was not in sound state of mind, there is absolutely no evidence led by the defendants except alleging that he was not hale and healthy. Whether he was incapable of understanding, whether his health condition was not permitting him to understand and his mental faculty was so disturbed that he was not in a position to understand as to what he was doing, there is absolutely no evidence led by the defendants. Only allegation was that the testator was in the habit of executing the document cancelling the same and the learned Counsel for the appellant has relied on the filing of suits against the defendant and his brother. However, in the will itself the testator has explained as regard to filing of suits and has specifically mentioned that the sons are not trustworthy. Will is not only executed but it is registered, and according to the appellant, the existence of Will was in the knowledge from July 1989 and admittedly, testator had lived for more than one year. Since the health condition or sound and disposing state of mind of the testator is proved beyond doubt and there being no evidence, which proves to the contrary, PW-2 states that the testator was hale and healthy at the time of execution of the will, defendant has not adduced any evidence to the contrary.

21. As regard to the other circumstances that, he has not bequeathed the property equally or equitably amongst all the heirs is concerned the testator has given one reason stating that, from amongst his daughters, six daughters are financially more benefited by him and two daughters are not much financially benefited and in favour of sons of those two daughters, he has bequeathed the property and as regards to bequeathing of property in favour of the son of another son, he has stated that he had a great love and affection towards him and as far as sons are concerned, he has referred in the Will that, both the sons are not trustworthy and as they had duped him by taking his signature on the gift deed and sale deed. These circumstances do reveal the clear intention of the testator that he was definite of his intention to dispose of the property in particular manner and he was also definite that he did not want to give any property to both of his sons because of their conduct with the testator. These circumstances do prove the clear intention of the testator, and it cannot be alleged that not giving share in the properties to the other children as suspicious circumstance. Testamentary document is not a partition deed. It is will and wish of the testator.

22. Insofar as the decisions relied by the learned Counsel for the appellants as

regard to the examination of one of the attesting witnesses no doubt, this Court in the case of Virupakshappa Malleshappa (supra) has observed that, evidence of the only attesting witness is unworthy of acceptance and also on the ground that when at more than one place there are misstatement of facts. This Court in a case where the attesting witness has denied himself being present at the time of execution of the Will, doubted his evidence and observed that, relying on the evidence of only attesting witness was not justified by the trial court, but this is not a case where attesting witness denied his presence at the time of execution of the Will, he has categorically stated that, not only he was present at the time of execution of the Will, but he has seen the testator putting signature and has also stated that he put his signature thereafter and another attesting witness also put his signature after the testator put his signature on the will. The signatures appearing on the Will also reveal that the document was properly executed. As far as non-examination of another attesting witness or the scribe is concerned, law does not require that another witness should be examined unless it is pointed out that the evidence of attesting witness, who has been examined, is doubtful and not reliable. From the evidence of PW-2, no doubt, there are some minor discrepancies, but that will not take away the effect of the evidence as regard to the proof of the execution of the Will. Further, the attesting witness not known to Janardhan and non-examination of Janardhan do not prove any doubt as regard to the execution of the will, when other circumstances are strong and trustworthy. In case of a testator, who is literate, worldly wise capable of taking decision, knowing reading and writing and when he was in sound state of mind, there would be hardly any doubt as to the execution. In addition to this, the said document is also registered before the Sub-Registrar where the testator has signed and has marked his thumb impression. These circumstances and evidence on record not only clearly prove the execution of the will according to law, but the same is free will executed by the testator while he was in sound state of mind.

23. In these circumstances, I do not find any error in the judgment of the court below.

Hence, there is no merit in the appeal and accordingly same is dismissed. However, there is no order as to the cost.