



IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 25TH DAY OF NOVEMBER, 2024

PRESENT

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

REGULAR FIRST APPEAL NO.100448 OF 2018 (PAR/POS)

BETWEEN:

KAMALAKAR MANJUNATH HEGDE,
A/A: 69 YEARS, OCC: AGRICULTURIST,
R/O: BASALEKOPPA,
TQ: SIRSI, U.K. DISTRICT.

.....APPELLANT

(BY SRI GIRISH V.BHAT, ADVOCATE)

AND:

- 1 . U.F.M. RAGHUPATI MANJUNATH HEGDE,
A/A 72 YEARS, RETIRED AND AGRICULTURIST,
R/O: HOUSE NO.1380,
SHRI.VISHWESHWARAYYA LAYOUT,
5TH BLOCK, NEAR SHANESHWARA TEMPLE,
ULLAL, BENGALURU-560056.
- 2 . VEERBHADRA MANJUNATH HEGDE,
A/A 67 YEARS, PRIVATE EMPLOYEE,
R/O: 134, SHRI SAI APARTMENT,
2ND FLOOR, 4TH MAIN ROAD,
4TH CROSS ROAD, VINAYAKA LAYOUT,
BOODASANDRA, BENGALURU-560094.
- 3 . RAMAKRISHNA MANJUNATH HEGDE,
A/A 61 YEARS, RETIRED EMPLOYEE,
R/O: "KEDAR", NEAR BASHETTIKERE,
SIRSI, U.K. DISTRICT-581402.
- 4 . GAJANAN MANJUNATH HEGDE
A/A 59 YEARS, OCC: AGRICULTURIST,
R/O: ARASIKERE, TQ: SIRSI,
U.K. DISTRICT-581402.



- 5 . DAKSHAYINI W/O. SUBRAY HEGDE,
A/A 71 YEARS, HOUSEHOLD,
R/O: ARASIKERE, TQ: SIRSI,
U.K. DISTRICT-581402.
- 6 . MANJUNATH SUBRAY HEGDE,
A/A 41 YEARS, AGRICULTURIST,
R/O: ARASIKERE, TQ: SIRSI,
U.K. DISTRICT-581402.
- 7 . AKHILA W/O RANGANATH,
A/A 46 YEARS, HOUSEHOLD,
R/O: SHRI RANGANATH,
KARNATAKA BANK REGIONAL OFFICE,
SHIVAMOGGA-577204.
- 8 . ACHALA W/O TIRUMALESHWAR HEGDE,
A/A 44 YEARS, HOUSEHOLD,
R/O: KUNDARAGI,
TQ: YELLAPUR, U.K. DISTRICT-581359.
- 9 . GANGA W/O MAHABALESHWAR HEGDE,
A/A 69 YEARS, HOUSEHOLD,
R/O: HARISHI, TQ: SORAB,
SHIVAMOGGA DISTRICT-577429.
10. YAMUNA W/O KRISHMURTHY,
A/A 67 YEARS, HOUSEHOLD,
R/O: MANCHALE, TQ: SAGAR,
SHIVAMOGGA DISTRICT-577426.

....RESPONDENTS

(BY SRI V.G.BHAT, ADVOCATE FOR R2, R4, R5, R7 AND R8;
SRI VISHWANATH HEGDE AND
SMT.TANUJA HEGDE, ADVOCATES FOR R6;
NOTICE TO R1, R3, R9 AND R10 ARE SERVED)

THIS REGULAR FIRST APPEAL IS FILED UNDER SECTION 96 CPC., PRAYING TO, SET ASIDE THE JUDGMENT AND DECREE PASSED BY COURT OF SENIOR CIVIL JUDGE COURT, SIRSI DATED 29.06.2018 IN O.S.NO.41/2012 TO THE EXTENT OF HOLDING THAT REGISTERED WILL OF BANGARI DATED 01.02.2012 AS NOT PROVED AND ANSWERING ISSUE NO.3 IN THE NEGATIVE AND DISMISSING I.A.NO.5 FILED BY APPELLANT AND HOLDING THAT APPELLANT IS ONLY ENTITLED TO 1/6TH SHARE IN SUIT PROPERTIES INSTEAD OF



2/7TH SHARE AND DECLARE THAT APPELLANT IS ENTITLED TO 2/7TH SHARE IN SUIT A TO C SCHEDULE PROPERTIES, IN THE ENDS OF JUSTICE AND EQUITY.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 22.10.2024 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, T. G. SHIVASHANKARE GOWDA J., PRONOUNCED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

CAV JUDGMENT

(PER: THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA)

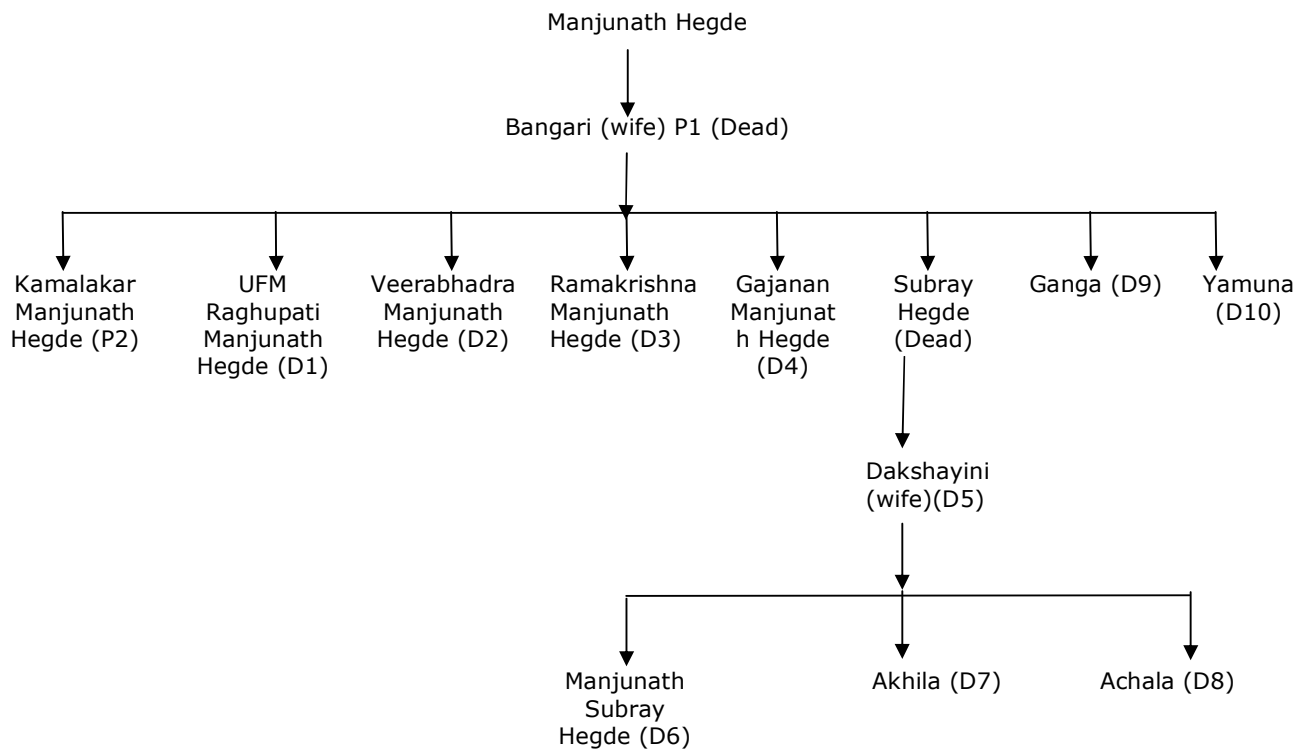
In this appeal, the plaintiff No.2 has challenged the judgment dated 29.06.2018 passed in O.S.No.41/2012 on the file of the Senior Civil Judge, Sirsi (for short, 'Trial Court').

2. The parties will be referred to as per their status before the Trial Court for the sake of convenience.

3. Briefly stated the facts of the plaintiffs' case are, one Manjunath Hegde is the propositus, one Bangari is his wife. The said couple had six sons and two daughters. One Subray Hegde, plaintiff No.2, defendants No.1 to 4 are the sons, defendants No.9 and 10 are the



daughters of the said couple. The 1st son-Subray Hegde died leaving behind his wife and three sons. Defendant No.5 is the wife and defendants No.6 to 8 are children of Subray Hegde. For better appreciation of facts, the genealogical tree is as follows:



3.1 During pendency of the suit, Bangari-the plaintiff No.1 died testate by executing a Will in favour of plaintiff No.2. Accordingly, plaintiff No.2 is claiming the share as a legatee under the said Will.



3.2 Both plaintiffs No.1 and 2 filed the suit seeking partition and separate possession of 1/7th share each in the suit property claiming that they are all the joint family properties of the plaintiffs, defendants No.1 to 4 and Subray Hegde. There was a registered partition deed executed on 13.03.2003 by defendants No.9 and 10 by taking Rs.50,000/-. Hence, the mother and the sons are entitled to claim share in the suit schedule properties. Five years prior to the institution of the suit, the 1st plaintiff demanded her elder son Subray Hegde to effect the partition and separate possession of her share. But he prolonged to effect partition and subsequently he died leaving behind his wife and children. The plaintiffs are constrained to file the suit for partition arraying all the children as the defendants.

3.3 In the plaint, it is also pleaded that plaintiff No.1 executed a registered Will on 15.05.2009 bequeathing her 1/7th share in favour of the plaintiff No.2. As there was some mistake in the survey numbers again



on 01.02.2012, the 1st plaintiff executed a registered Will bequeathing her undivided 1/7th share in the suit properties in favour of the plaintiff No.2. Accordingly the plaintiff No.2 claimed 2/7th share in the suit properties.

4. Defendants No.1, 2 and 4 to 6 in their joint written statement admitted that, the suit properties are joint family properties of the mother and sons as the daughters separated in the year 2003. They denied the Will executed by plaintiff No.1 in favour of plaintiff No.2 on 15.05.2009 and also on 01.02.2012. It is their contention that the mother was having equal love and affection for all her children, there was no necessity for her to execute the Will in favour of plaintiff No.2. Hence, the Will is shrouded with suspicious circumstances and plaintiff No. 2 cannot be allotted share of the mother.

4.1 Defendant No.9 in her written statement supported the stand taken by defendants No.1, 2 and 4 to 6 in their joint statement and she sought for her share in the suit properties.



4.2 Defendant No.3 in his written statement has admitted the averments made in the plaint and also execution of the Will dated 01.02.2012 by the mother in favour of the plaintiff No.2.

4.3 During the pendency of the suit, plaintiff No.1 died, plaintiff No.2 filed I.A.No.5 under Order XXII Rule 3 and 5 of C.P.C. to declare him as a testamentary heir to the extent of share of the mother by virtue of the Will dated 01.02.2012.

5. The Trial Court framed the following issues:

- i. Whether the plaintiffs prove the correct description of the suit properties?*
- ii. Whether they further prove the alleged relinquishment of defendant Nos.9 and 10 of their share in the suit properties in favour of the manager of the family by receiving amount in the year 2003?*
- iii. Whether they further prove the alleged execution of Will dated 15-05-2009 by the 1st plaintiff in favour of the 2nd plaintiff and thus the alleged executing of the subsequent Will dated 01-02-2012 as urged in para 5 of the plaint?*
- iv. Whether defendant No.7 proves that the suit of the plaintiffs is not maintainable for non-*



inclusion of all the family properties in the suit?

- v. Whether the plaintiffs are entitled to claim their 2/7th share in the suit properties?*
- vi. Whether defendant Nos.5 to 9 also prove their entitlement to claim share in the suit properties as prayed for?*
- vii. What order orders decree?*

6. On behalf of the plaintiffs, plaintiff No.2 and one witness were examined as PWs.1 and 2 and 19 documents came to be marked as Exs.P1 to P19. On behalf of defendants, defendant No.6 and two witnesses were examined as DWs.1 to 3 and 10 documents came to be marked as Exs.D1 to D10.

7. After hearing both the parties, the Trial Court answered Issue No.1, 5 and 6 partly affirmative, Issue No.2 in affirmative, Issue No.3 in negative, deleted Issue No.4 and by answering Issue No.7 decreed the suit of the plaintiffs partly granting 1/6th share to the 2nd plaintiff in plaint 'A' to 'C' schedule properties and dismissed the suit in respect of plaint 'D' and 'E' properties. Also allotted



1/6th share each to defendants No.1 to 4 and 1/6th share together to defendants No.5 to 8 towards share of Subray Hegde.

8. Aggrieved by the same, the plaintiff No.2 is before this Court on the ground that plaintiff No.1 in her pleading itself pleaded the execution of the Will dated 01.02.2012. Plaintiff No.2 has proved the Will by examining the attesting witness. Will was executed by his mother with free consent and sound disposing state of mind. DW2 in the cross-examination admitted that the plaintiff No.1 was in sound disposing state of mind till her death. There is a clear endorsement by the Sub-Registrar on the Will about the condition of the plaintiff No.1 when the Will was registered at her home. The Trial Court has given undue importance to the minor discrepancies in the testimony of plaintiff No.2. No pleadings in the written statement that the plaintiff No.2 was involved in execution of Will in his favour. When the Will is proved, the plaintiff



No.2 is entitled to allotment of share of plaintiff No.1. Trial Court erroneously answered Issue No.3 in the negative.

9. Heard the arguments of Sri Girish V.Bhat, learned counsel for plaintiff No.2/appellant, Sri Vishwanath Hegde, learned counsel for respondent No.6/defendant No.6 and Sri V.G.Bhat, learned counsel for respondents No.2, 4, 5, 7, 8/defendants No.2, 4, 5, 7 and 8.

10. It is contended by learned counsel for plaintiff No.2 that the appeal is only restricted to the extent of Issue No.3 i.e. execution of the Will by the mother in favour of plaintiff No.2. PW1 is the propounder of the Will; he has tendered the original Will and examined the PW2-attestor. The defendant No.3 has admitted the execution of the Will in favour of plaintiff No.2. Except the fact that due to old age, the mother was confined to home, she was in sound state of mind and that has been admitted by DW1 in the course of cross-examination. Nothing has brought out in the cross-examination of PWs.1 and 2.



10.1 It is plaintiff No.2 who took care of the mother in her old age and last days. The other defendants are not residing with the mother; they were residing at Bengaluru, Arasikere, Sirsi, Shivamogga, Yallapura, Soraba and Sagara. For the reason that plaintiff No.2 took care of the mother in her old age with love and affection she bequeathed her share of property. If the division had been effected five years prior to the institution of the suit by Subray Hegde, the 1st son, plaintiff No.1 would have transferred her right as per her wish; the delay in partition forced her to express her wish in the form of a testamentary document. It is the duty on the part of her children to respect the wishes of their mother.

10.2 In the plaint itself, the 1st plaintiff has pleaded the execution of the Will, her sound state while bequeathing her share of property in favour of the plaintiff No.2. The recitals in the Will itself clearly point out that her earlier days of life, none of the defendants had taken care of the mother and it was only plaintiff No.2 who had



taken care of her and for this reason the mother, though having love and affection towards other children, bequeathed the property for the service rendered by plaintiff No.2. The Trial Court without appreciating these aspects has suspected the genuineness of the Will and granted only 1/6th share instead of 2/7th share in the suit properties and he sought for modification of the share by allotting share of the mother in favour of the plaintiff No.2 as a legatee under the Will.

11. *Per contra*, learned counsel for respondents/defendants No.2, 4 to 8 have contended that the mother died at the age of 90 years. She was not commanding good state of health; she was confined to the home. She was influenced by plaintiff No.2. The other children also took care of the mother whenever they visited Basalekoppa where the mother was residing. The plaintiff No.2 alone did not take care of the mother, mother was not having ill-will against the other children. There was no occasion for the mother to deviate the natural succession



of her share by her own children by bequeathing her share in favour of plaintiff No.2 alone. All the plaintiffs, defendants were not well established. Other sons were also doing agriculture and the mother had equal love and affection towards daughters. If she had genuine intention to execute the Will, she ought not to have executed the repeated Wills and for this reason, the Will has been modified for the convenience of plaintiff No.2. The defendants have demonstrated that the Will was tailored at the instance of the plaintiff No.2, Trial Court has rightly doubted and held that Will is shrouded with suspicious circumstances. No prejudice is caused to the plaintiff No.2 as he is getting his legitimate share, there is no reason to modify the same and they argued in support of the impugned judgment.

12. We have given our anxious consideration to the arguments addressed by the learned counsel on both the sides and perused the material available on record.



13. The points that arise for our consideration are as follows:

- i. Whether the trial has correctly held that Will dated 01.02.2012 is shrouded by suspicious circumstances?
- ii. Whether the plaintiff No.2 is entitled 2/7th share in the suit properties?
- iii. Whether the impugned judgment is perverse, illegal and calls for interference?

Regarding Point No.(i)

14. In order to prove the Will, the plaintiffs produced the Will as per Ex.P18 and in support of its execution examined one of the attestors as PW2. Plaintiff No.2 has also entered the witness box as PW1 being the propounder claiming that Ex.P18 is the last Will of his mother and her 1/8th share in the property has to be given to him.

15. We have carefully perused the evidence of the 2nd plaintiff. He has asserted the execution of the Will by his mother on 15.05.2009 as well as on 01.02.2012. Since



the Will dated 15.05.2009 came to be cancelled under the Will dated 01.02.2012, the 2nd plaintiff is required to prove the Will dated 01.02.2012. During the course of cross-examination, the 2nd plaintiff admits that there was relinquishment deed executed by his sister in the year 2003. His mother had equal love and affection for all her children; she was residing with him only; the 1st defendant being the teacher was only helping the mother to certain extent. He has denied the assertion on behalf of the defendants No.2 to 8 that the plaintiff No.1 was not commanding good health and mental condition. An effort was made to demonstrate the presence of the plaintiff No.2 and his wife at the time of execution of the Will but was not able to demonstrate it. PW1 was not aware of registration of the Will, his mother calling the Sub-Registrar and the attesting witnesses to her residence, about those persons who she had asked to attest her Will. He has stated that he did not pay money to the Sub-Registrar for his visit to his house. He was not aware fee paid to the Sub-Registrar by his mother. He also did not



know who presented the Will to the Sub-Registrar. But he admits illness of his mother. Even for signing the plaint and also filing the suit, his mother did not visit Sirsi or attend the office of their advocate. His mother died due to old age. His mother only had called the scribe and other witnesses over phone. She was conversant with the survey numbers of the properties. It was the mother who had instructed the scribe to write the Will by furnishing the details orally. The mother was suffering from diabetes and blood pressure and she was sleeping on the waterbed. According to him, Dr.Patavardhan treated his mother, his mother knew about her disease and it was not curable. Both the attestors and scribe of the Wills are different.

16. Cross-examination on behalf of the defendant No.9 suggests that she had not executed any relinquishment deed in the year 2003, the mother never executed the Will with the convenience of the attestors, he got prepared the Will, the Will was created to defraud his brothers and sisters taking undue advantage of mother



who residing with him and the Will was fraudulent one, due to old age ailments, mother was not physically and mentally in a sound state of mind. Nothing has been brought out from PW1 which would shroud the Will with suspicious circumstances including mental instability of mother.

17. We have scrutinized the evidence of PW2-Krishna Chidambara Hegde, the attestor to the Will. Whose evidence shows he received the phone call from the plaintiff No.1 requesting him to come to her house to attest the Will at 5.30 p.m. on the next day. When he visited her house at around 5.20 p.m. on the next day, Parameshwar Achar, one advocate, Sub-Registrar and his assistant were present. Before him, the Sub-Registrar read the recitals of the Will, plaintiff No.1 admits its correctness and she put her LTM as her hand was shaking. Thereafter he and Parameshwar Achar signed the Will and then the advocate. Sub-Registrar did the registration process. In his cross-examination, he explained the health condition of



the plaintiff No.1 that she was not able to walk, she required walker and lying on the waterbed. At the time of execution of the Will, plaintiff No.2 and his wife were not present. Plaintiff No.1 was having love and affection towards her sons, daughters-in-law and grand children. She had a low vision due to old age, her hearing was low. Except this, nothing is brought out from his mouth that she was not in a position to take any decision nor the plaintiff No.2 had taken control of his mother. It was defendant No.4 who used to stay with the mother whenever there was inconvenience for the plaintiff No.2. Except this nothing has been brought about mental condition of the plaintiff No.1 as urged by the contesting defendants.

18. In order to rebut the claim of the plaintiff to explain shrouded circumstances on the Will, defendant No.6 who is the son of Subray Hegde is examined as DW1. We have also perused his evidence. He has asserted that the plaintiff No.2 created the Ex.P18-Will to cheat his



brothers taking advantage the mother residing with him. In the cross-examination, he has admitted that during final days of plaintiff No.1, she was taken care of by plaintiff No.2 and by his wife. When suggestion was put about execution of Ex.P18, he pleads ignorance. He did not explain the suspicious circumstances that were proposed by the defendants.

19. DW2-Nagesh Parameshwar Hegde has examined to explain the suspicious circumstances. We have perused his testimony also. His evidence clearly point out that plaintiff No.1 never informed about execution of the Will and he did not refer to anything about the physical and mental health condition of the plaintiff No.1. His cross-examination has demonstrated that the plaintiff No.1 had worldly knowledge that her hearing was good though she was ill, and that her mental status was good. It is the plaintiff No.2 and his wife who had taken care of the plaintiff No.1 till her death. He was ignorant about the demand of partition by the plaintiff No.1 with her son and



also execution of the Will. Plaintiff No.1 was having equal love and affection towards his children. His testimony did not demonstrate anything on state of mind of plaintiff No.1 nor anybody can take control on her decisions.

20. DW3-Jagadish Hegde is the son of defendant No.9 who entered the witness box as GPA holder of his mother. His testimony shows that his mother has not executed any release deed in the year 2003, his grandmother had not executed any Will in favour of the plaintiff No.2. His mother is entitled to 1/8th share in the suit schedule properties. His cross-examination on behalf of defendants No.4 to 8 brought out that his grandmother was suffering from illness and she was residing in the house of the plaintiff No.1. She was on wheel chair, her hearing capacity was very low and she was not mentally active. It is also brought out from his mouth that the execution of Ex.D1-release deed in the year 2003 by his mother. He admits the signature of his mother in Ex.D1. He has heard his grandmother had executed a Will. This



goes to demonstrate that there was a release deed executed by his mother under Ex.D1 and his grandmother had executed a Will during her lifetime.

21. By taking the totality of the evidence on behalf of the plaintiffs as well as the defendants, it is crystal clear that the plaintiff No.1 during her lifetime had executed a Will. Attestor of the Will has certified that the plaintiff No.1 was commanding good state of mental health though she was not commanding good physical health. Nothing is brought out on behalf of the defendants that the plaintiff No.2 had no capacity to make any decision. That apart on careful perusal of the plaint, the plaintiff No.1 has signed the plaint and also the vakalat and she has instituted the suit seeking partition. It is the specific plea that she had executed a registered Will in favour of the plaintiff No.2 bequeathing her share of properties in his favour on 01.02.2012. The witnesses examined on behalf of the defendants though admit the execution of the Will, their



grievance is only in respect of diversion of her share to the plaintiff No.2.

22. Evidence on record point out that the plaintiff No.1 was aged, she was suffering from illness, she was taken care of by the plaintiff No.2 and his wife till her last days. Records also show that except defendant No.4 who arranged the wheel chair and occasionally used to stay with the mother, the remaining children were only visiting occasionally and they were not the local residents and they are all residing far of places. When the plaintiff No.2 and his wife have taken care of the mother, quite naturally the mother might have had special love and affection towards them. On careful perusal of the recitals of the Will in question, there is a specific recital that during her older days, she was completely ignored by her other sons and daughters-in-law. They were agitating to take care of her and they had completely neglected her since several days. For this reason she had a special love and affection towards plaintiff No.2 as he had taken care of them during



her final days. The reasons assigned in the Will and also cross-examination of the plaintiff No.2 and defendant witnesses did not brought out anything that the mental condition of the plaintiff No.1 was at any point of time was decreased, she was not in a sound state of mind to take any decision except the fact that she was moving on the wheel chair, using waterbed, confined to the house. She was suffering from blood pressure, sugar and other ailments, the doctor who treated her informed her ailments will not be cured. Nothing is brought out on record to show that at any point of time any of her other children or the daughter-in-laws have taken her to their residence and taken care of her health. With such an ailment while plaintiff No.1 was residing with plaintiff No.2 and his family taken care of, the other sons and daughter-in-laws agitate to look after her, nor they have taken care of her, her decision to divert her share of property is not unnatural.



23. The suggestions only show that they were doing flying visit the house of the plaintiff No.2. It goes to show that the plaintiff No.2 and his wife alone are taken care of the mother at her last days and even she was died in the house of the plaintiff No.2. Specific allegations made in the plaint by the plaintiff No.1 that she wanted to gift the property in favour of the plaintiff No.2. For that reason, she was demanding partition with Subray Hegde, but he was not effected the partition and for this reason, she has executed the Will. Compliance of Section 63 and 68 of the Evidence Act has been made and the defendants failed to cast cloud of doubt on her mental condition. Proposed suspicious circumstances by the defendants have been dispelled by the evidence and there is no reason to doubt the mental capacity of the 1st plaintiff to execute the Will in question. Hence we are persuaded to hold that the plaintiff No.1 when she was in sound state of mind executed the Will dated 01.02.2012 with above all the suspicious circumstances.



24. Another point is plaintiff No.1 giving entire share to the plaintiff No.2. As evidence point out that none of her other children and daughter-in-laws have taken the plaintiff No.2, they were only doing flying visit. Defendant No.4 provided wheel chair and stayed with the mother whenever plaintiff No.2 was having some inconvenience. It explains no circumstance that plaintiff No.1 had take decision to part a portion of her share to her other sons and daughter-in-laws. If a prudent man sits on the arm chair of the testator in the factual circumstances, one can make out that the plaintiff No.1 with sound state of mind has taken a decision to bequeath her share of property in favour of the plaintiff No.2. We do not find any suspicious circumstances in the act of the plaintiff No.1 in directing her share. Accordingly Point No.(i) is answered.

Regarding Point No.(ii)

25. It is undisputed fact that Manjunath Hegde died in the year 1990 leaving behind his wife-Bangari. During the pendency of the suit, she died bequeathing her



share of property in favour of the plaintiff No.2. The properties are required to be divided amongst the wife and children of Manjunath Hegde. Manjunath Hegde and Bangari begot six sons and two daughters i.e. defendants No.1, 2, plaintiff No.1, defendants No.3 and 4 and Subray Hegde. Subray Hegde died leaving his wife and children i.e. defendants No.5 to 8. Defendants No.9 and 10, the daughters, are already released from the family by virtue of a registered release deed of the year 2003. There remained only defendants No.1 to 4, plaintiffs No.1 and 2 and Subray Hegde. If this is taken into consideration, the property has to be divided between them equally. There are seven sharers in the family and each of them is entitled to $1/7^{\text{th}}$ share i.e. plaintiffs No.1 and 2, defendants No.1 to 4 are entitled to $1/7^{\text{th}}$ share each and the defendants No.5 to 8 being the wife and children of Subray Hegde are together entitled to $1/7^{\text{th}}$ share. In view of finding on Point No.(i) that the Will dated 01.02.2012 had been executed by the plaintiff No.1 bequeathing her share of property in favour of plaintiff No.2, plaintiff No.2 is



entitled to the share of his mother in addition to the share that he is entitled as a member of the family. Hence defendants No.1 to 4 take $1/7^{\text{th}}$ share each and defendants No.5 to 8 are together entitled to $1/7^{\text{th}}$ share and that of the plaintiff No.2 gets to $2/7^{\text{th}}$ share. Accordingly we answer Point No.(ii).

Regarding Point No.(iii)

26. We have carefully perused the impugned judgment. The Trial Court has given a reason that it is the duty of the every member of the family i.e. the children to take care of the parents in their old age and accordingly plaintiff No.2 did take care of his mother during her lifetime and there is no special reason for treating him differently. Trial Court also observes other defendants have also taken care of the mother. The Trial Court assumed the emotions and sentiments of the parties and duty of the children to take care of the parents. But Trial Court failed to consider the specific pleading of plaintiff No.1, that she was demanding Subray Hegde to effect the



partition so that she can gift her share of property to the plaintiff No.2 with whom she was residing. Undisputedly it is the plaintiff No.2 who took care of his mother till her last breath. The execution of the Will in the year 2009 as well as 2012 has been pleaded by the plaintiff No.1 in the plaint. None of the defendants has questioned the capacity of the plaintiff No.1 to file the suit and to brief her advocate seeking her share of properties. When the Will is proved, the plaintiff No.1 having equal share with her children that share has to go in favour of the plaintiff No.2. While considering the execution of the Will, the intention of the testator has to be considered by applying the principle of arm chair. The Court is required to sit in the arm chair of the testator to find out the genuineness of the intention of the testator. Though the plaintiff No.1 had physical ailment, she was in a sound disposing state of mind. She assigned reasons why she avoided the succession to her share by other children and her intention to bequeath her share in favour of the plaintiff No.2. As discussed above, we are persuaded to accept the Will



executed by the plaintiff No.1 which is above all the suspicious circumstances, hence finding recorded by the Trial Court regarding the Will is erroneous and misconceived, needs interference.

27. In view of our above finding, one share has to be allotted to the mother that share has to go in favour of the 2nd plaintiff. In that view of the matter, the share allotted by the Trial Court at 1/6th each to the plaintiff No.2, defendants No.1 to 4 and defendants No.5 to 8 together requires modification. Accordingly we answer Point No.(iii).

28. In view of our finding on Points No.(i) to (iii), we hold that appeal deserves merit consideration, in the result, the following:

ORDER

- i. Appeal is allowed;
- ii. Impugned judgment of the Trial Court is modified;



- iii. It is declared that plaintiff No.2 is entitled to 2/7th share in the suit schedule properties. The defendants No.1 to 4 each and defendants No.5 to 8 together entitled to 1/7th share in the suit schedule properties;
- iv. Decree is modified accordingly.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(T. G. SHIVASHANKARE GOWDA)
JUDGE

CLK
LIST NO.: 1 SL NO.: 1