



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF SEPTEMBER, 2024

PRESENT

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR JUSTICE UMESH M ADIGA

REGULAR FIRST APPEAL NO. 280 OF 2016 (DEC)

BETWEEN:

DR. M.V.SHETTY MEMORIAL TRUST
A REGISTERED PUBLIC TRUST
ESTABLISHED UNDER
REGISTERED TRUST DEED
DATED 15.10.1985
REPRESENTED BY ITS TRUSTEES

- 1) DR M RAMGOPAL SHETTY
S/O LATE M. VENUGOPAL SHETTY,
AGED ABOUT 70 YEARS,
"SWAGATH" OLD KENT ROAD,
MANGALURU - 560 001.
- 2) MR. K.M. SHETTY
S/O M. RAMANNA SHETTY,
AGED ABOUT 85 YEARS,
R/AT D.NO.26-15,
ABSHOT LAYOUT,
SANKEY ROAD CROSS,
BANGALORE-560 051.
- 3) MR. A. RAMACHANDRA SHETTY
S/O DASAPPA SHETTY ,
AGED ABOUT 77 YEARS,
RESIDING AT KADRI KAIBATTAL,
MANGALORE-575 003.
- 4) DR. RANJITH SHETTY
S/O K.B. SHETTY ,



AGED ABOUT 57 YEARS,
R/AT VENUS MANOR,
II FLOOR, KADRI KAMBLA ROAD,
MANGALORE-575 003.

- 5) DR.(MRS.) DIVYANJALI R SHETTY
W/O DR. RANJITH SHETTY,
AGED ABOUT 57 YEARS,
R/AT VENUS MANOR,
II FLOOR, KADRI KAMBLA ROAD,
MANGALORE-575 003.
- 6) MRS. HIMA URMILA SHETTY
D/O LATE K.S. BHANDARY,
W/O DR. M.R SHETTY,
AGED ABOUT 77 YEARS,
"SWAGATH, DR. M.V. SHETTY ROAD,
MANGALORE-575 001.
- 7) MRS. ROHILA SHETTY
W/O DR.RAVISHANKAR SHETTY,
AGED ABOUT 43 YEARS,
"SWAGATH", DR. M.V. SHETTY ROAD,
MANGALORE - 575 001.

...APPELLANTS

(BY SRI. A MADHUSUDHANA RAO., ADVOCATE)

AND:

1. MR. M. MOOSA MOIDEEN
SON OF M. MOIDEEN,
AGED ABOUT 67 YEARS,
R/AT HASSEENA BAGH,
OLD KENT ROAD,
PANDESHWAR,
MANGALORE - 575 001.
2. MR SATHISH B.N.
SON OF A.B. NARAYANA,
AGED ABOUT 49 YEARS,
R/AT OLD KENT ROAD,
ATTAVAR,



MANGALORE – 575 001.

...RESPONDENTS

(BY SRI. K CHANDRANATH ARIGA., ADVOCATE FOR R1,
R2 IS SERVED AND UNREPRESENTED)

THIS RFA IS FILED UNDER SEC.96 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED 23.11.2015 PASSED IN O.S NO.344/2004 ON THE FILE OF THE 2ND ADDL. SENIOR CIVIL JUDGE, MANGALURU, D.K, DISMISSING THE SUIT FOR DECLARATION.

THIS APPEAL, HAVING BEEN RESERVED FOR JUDGEMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, **UMESH M. ADIGA, J.**, PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR
and
HON'BLE MR JUSTICE UMESH M ADIGA

CAV JUDGMENT

(PER: HON'BLE MR JUSTICE UMESH M ADIGA)

This is plaintiffs' appeal against the judgment and decree passed by the learned II Additional Senior Civil Judge, Mangaluru, Dakshina Kannada in O.S.No.344/2004, dated 23.11.2015 (hereinafter for brevity referred to as 'trial Court').

2. We refer the parties as per their ranks before the trial Court.



3. It is the case of the plaintiffs that one Smt. Appi Hengsu was absolute owner of the suit property. She purchased item No.3 of the 'A' schedule property under the registered sale deed dated 05.02.1975, from Dr.M.Venugopal Shetty and item Nos.1 and 2 under registered Sale Deed dated 05.02.1975 from A. Kalyani Shetty.

4. Late Smt.Appi Hengsu had four children by names Sanjeeva, Smt. Nanda, Smt. Ahalya and Ramesh. The said Appi Hengsu by executing registered trust deed dated 16.05.1981 had created private trust in respect of suit schedule property. According to the said trust deed, her elder son Ramesh was appointed as sole trustee to look after and manage the trust property. The terms and conditions of management and administration of the trust were mentioned in the registered trust deed dated 16.05.1981.



5. Ramesh, who was the first trustee of the said trust, died unmarried during the year 1994. As per the trust deed, the senior most male lineal descendant of Smt. Appi Hengsu, should be appointed as trustee. The next senior most male lineal descendant was Satish S/o. Smt. Nanda R. Attavar. Sathish was settled in U.S.A., therefore, he declined trusteeship. Therefore, the next eligible male descendant, Navaneeth Kumar, son of Smt.Ahalya, became trustee. The possession of trust property was with one A.B. Narayan, brother of Smt. Appi Hengsu and trust was not getting any income from trust property.

6. Mr. Navaneeth Kumar, trustee, was residing in Kadri/Mangaluru, which was about 4 kms away from the suit property. On 22.09.2004, he noticed the building constructed in the suit property being demolished. On enquiry, he came to know that defendant No.1 along with some others demolished the building situated in the suit property. The said Navaneeth enquired with defendant



No.1 and came to know that defendant No.1 had purchased the said property from defendant No.2 under registered sale deed and taken over possession of suit property.

7. The trust had no income and Navaneeth Kumar had no sufficient funds to spend for litigation. Therefore, he gifted the suit schedule property in favour of plaintiff – trust, by registered gift deed dated 02.11.2004. By virtue of the said gift deed, plaintiffs acquired right, title and interest over the suit property.

8. It is the further case of the plaintiffs that on enquiry with defendant No.2, it got information that Smt. Appi Hengsu had executed an unregistered will dated 15.10.1982 in favour of her brother A.B. Narayana and virtue of the said will, A.B. Narayana became absolute owner of the property after the death of Smt. Appi Hengsu. The said A.B. Narayana had executed registered perpetual lease deed dated 03.05.1997 and a registered



mooli transfer deed. On the strength of the said transfer deeds, defendant No.2 has executed registered sale deed in favour of defendant No.1 dated 24.10.1997. Plaintiffs denied execution of all these documents. It has contended that late Appi Hengsu had not executed any such documents in favour of A.B. Narayana. Hence, late Narayana had no right over suit property. With these reasons, plaintiff – trust prayed for the following reliefs:

- a. *For a declaration that the plaintiff trust is the lawful owner of the plaint 'A' schedule property.*
- b. *For recovery of possession of the 'A' schedule property by directing the 1st defendant to vacate the 'A' schedule property and hand over its possession to the plaintiff trust.*
- c. *For payment of mesne profits at the rate of Rs.100/- per day from the date of suit till the 1st defendant vacates the 'A' schedule property.*



*d. For interest on future mesne profits
at 6% p.a. from the date of suit till
the date of payment.*

9. Defendant Nos.1 and 2 filed separate written statements. The contention of defendant No.1 is of total denial. Defendant No.1 has further stated that plaintiff – trust had no right over the property. The said Navaneeth Kumar had no right to transfer the property in favour of plaintiff. Therefore, by virtue of said trust deed, it would not become the owner of the property.

10. Defendant No.1 has further stated that by virtue of the will executed by Late. Appi Hengsu, Late.A.B. Narayana became the absolute owner of the property. He executed registered perpetual lease deed in favour of defendant No.2 and in turn defendant No.2 transferred the said property in favour of defendant No.1 through the registered sale deed. Therefore, by virtue of the said sale deed, he became the absolute owner of the suit property



and has every right to enjoy the same. Accordingly, he prayed for dismissal of the suit.

11. Defendant No.2 has also denied the contention of the plaintiff and he has also reiterated contention of defendant No.1 regarding the acquisition of the property by Late.A.B. Narayana from Late. Appi Hengsu by virtue of unregistered Will and transferred the right over said property in his favour by his father and thereafter, he executed registered sale deed in favour of defendant No.1 and prayed for dismissing the suit.

12. The trial Court framed the following issues:

- 1) *Whether the plaintiffs proves that item No.1 and 2 of the plaint 'A' schedule property acquired by Appi Hengsu as per the Registered Sale deed dated 05.02.1975.*
- 2) *Whether the plaintiffs proves that plaint 'A' schedule properties are the trust properties belonging to the trust under*



the registered trust deed dated 16.05.1981 executed by late Appi Hengsu.

- 3) Whether the plaintiffs proves that Navaneeth Kumar as the trustee has executed a registered Gift Deed dated 02.11.2004 with respect of 'A' schedule properties in his favour?*
- 4) Whether the plaintiffs proves that A.B. Narayana had no title over the plaint 'A' schedule properties and 2nd defendant also did not acquire title of 'A' schedule property and the possession of defendant No.1 of the 'A' schedule property is unlawful and without title?*
- 5) Whether the plaintiffs proves that he is the lawful owner of the plaint 'A' schedule property?*
- 6) Whether the 1st defendant proves that Appi Hengsu had executed her last 'Will' dated 15.10.1982 bequeathing the entire plaint schedule property in favour of A.B. Narayana father of 2nd defendant?*
- 7) Whether the 1st defendant proves that A.B. Narayana had executed a registered*



*deed of perpetual lease dated 03.05.1997
in favour of 2nd defendant?*

- 8) *Whether the defendant No.1 proves that plaintiff has not properly valued the suit and Court fee paid by the plaintiff is not correct?*
- 9) *Whether the plaintiff is entitled for the reliefs as prayed for?*
- 10) *Whether the plaintiff is entitled for mesne profits as prayed for?*
- 11) *What Order or Award?*

13. During the trial of the case, the plaintiff's to prove his case, examined PWs.1 to 5 and got marked Exs.P1 to P27 and closed its evidence. The defendants examined DWs.1 to 4 and got marked Ex.D1 to D38 and closed their evidence.

14. The trial court after hearing both the parties and appreciating pleadings and evidence on record, answered the issues and by the impugned judgment, dismissed the suit. The trial court held that trust deed



was executed by Late. Appi Hengsu but Navaneeth Kumar had no right over the said property to execute the gift deed in favour of plaintiff-trust. It also disbelieved the will propounded by defendant No.2 and said to have been executed by late Appi Hengsu in favour of A.B. Narayana and consequently rejected the claim of defendants that defendant No.1 was the owner of the property.

15. Being aggrieved by the same, plaintiffs have preferred this appeal on the grounds mentioned in the appeal memo.

16. We have heard the arguments of learned counsel for both the parties.

17. The following question emerges for our determination:

1. Whether the trial judge is justified in holding that Navaneeth Kumar had no right to execute the gift deed in favour of the plaintiff trust?



18. Our answer to the said question is in the negative for following reasons:

The learned counsel for the appellants would submit that the trial court has not appreciated the evidence properly in respect of right of Navaneeth Kumar. The trial court dismissed the suit only on the ground that there was no evidence on record that Navaneeth Kumar was a trustee of the said trust. The said reasoning given by the trial court is incorrect. As per the registered trust deed, lineal male descendant of the family of Late. Appi Hengsu would become trustee. It was not in dispute that after the death of Ramesh, the next surviving member of the family was son of Smt. Nanda R. Attavar by name Sathish. He was settled in U.S.A. Therefore, he declined to act as a trustee. The next male member of the family was Navaneeth Kumar, who is the son of another daughter of Smt. Appi Hengsu by name Smt. Ahalya. He became the trustee and both Smt. Nanda and Smt. Ahalya gave



consent for the appointment of Navaneeth Kumar as a trustee. The said consent letter had been proved by the appellants by examining relevant witnesses. The said consent letters were executed in the presence of notary. The notary was examined and the relevant register of the notary was also produced and marked. Smt. Nanda R.Attavar and Smt. Ahalya had bank accounts. To prove signatures on consent letters, appellants got produced their respective specimen signatures available in the bank and examined the manager of the bank. This evidence led by the appellants is sufficient to hold that Navaneeth Kumar became the trustee of the said trust.

19. The learned counsel for the appellants has submitted that if anybody were to challenge the appointment of the trustee, they were none other than legal heirs of Appi Hengsu. Till this day, there is no challenge to the appointment of Navaneeth Kumar as a trustee. Defendants have nothing to do with the said trust and they cannot dispute appointment of Navaneeth Kumar



as a trustee. Under these circumstances, there was no reason for the trial court to hold that plaintiffs had failed to prove that Navaneeth Kumar had an authority to act as a trustee and execute gift deed (Ex.P10) dated 02.11.2004.

20. The learned counsel for the appellants would further submit that plaintiff is a trust constituted for the benefit of society. Therefore, Navaneeth Kumar, had executed gift deed in favour of plaintiff-Trust. Navaneeth Kumar had no source of income to fight the litigation against the defendants and the trust had no source of income to protect the interest of trust property. Therefore, with a good intention that the property of Late. Appi Hengsu shall be utilized for the benefit of the society, Navaneeth Kumar executed the gift deed as per Ex.P10.

21. Defendants have not challenged the gift deed executed by Navaneeth Kumar. Defendant No.2 has contended that his father Late. A.B. Narayana had become the owner of the property by virtue of the will executed by Late. Appi Hengsu. Defendants failed to prove the said



will. No revenue records were mutated after death of Appi Hengsu on the basis of the will. In the alleged will, even there is no reference to the trust deed executed by Appi Hengsu, which is not disputed by the defendants. There are several suspicious circumstances about the execution of the will and the said suspicious circumstances were not cleared by the respondents. The trial court rightly rejected the said contention of the defendants about execution of the will. It is not challenged by the defendants by filing an appeal and hence, defendant No.2 was not at all the owner of the property and had no right to execute sale deed in favour of defendant No.1. Defendant No.1 would not get any right by virtue of the sale deed executed by defendant No.2.

22. Learned counsel for the appellants has further submitted that the plaintiff-trust is entitled to the relief prayed in the suit. The trial judge dismissed the suit only on the technical ground that Navaneeth Kumar failed to prove that he was appointed as a trustee, which is



incorrect. Hence, prayed for setting aside the said findings and allowing the appeal.

23. The learned counsel for respondents submits that the trial court has rightly dismissed the suit. There are no materials on record to prove that Navaneeth Kumar had any authority to act as trustee of the said trust. Members of the family of Appi Hengsu have not appointed or selected him as a trustee. Appi Hengsu had another son, by name Sanjeeva. In the cross-examination of PW-1, he has stated that said Sanjeeva had two daughters and one son. He was elder to Smt. Ahalya. For the sake of discussion, even if it is accepted that Sathish did not accept the trusteeship, then next person would be the son of Sanjeeva. There is no reference to him in the plaint. Therefore, the trial judge, rightly held that Navaneeth Kumar had no authority to execute gift deed in favour of plaintiff.



24. The learned counsel for respondents further submitted that even though respondents have not filed any appeal, they can challenge the rejection of the will under Order 41 Rule 22 of CPC because it was the defense of defendants. The defendants have produced the original will executed by Appi Hengsu; they had examined attesting witness to the Will and able to prove that Appi Hengsu had love and affection on Late A.B. Narayana and she executed the will.

25. The learned counsel for respondents has further submitted that it is not in dispute that Late A.B. Narayana was the brother of Appi Hengsu. Even in the trust deed, his name is mentioned as beneficiary. The said circumstances supports the contention of defendant No.2 that Appi Hengsu had love and affection towards A.B.Narayana. Reasons for excluding the natural heirs is stated in the will. Therefore, no suspicious circumstances clouded the will.



26. The learned counsel for respondents has further submitted that A.B. Narayana became owner of suit property after death of Appi Hengsu by virtue of the will. It is not in dispute that during life time of Appi Hengsu, A.B. Narayana was in actual possession of the suit property. A.B. Narayana had executed transfer deeds in favour of defendant No.2 and conveyed title and possession of the suit property to him. Defendant No.2 became the absolute owner of the suit property. Defendant No.2 has executed sale deed in favour of defendant No.1. Thus, defendant No.1 became absolute owner of the suit property. Navaneeth Kumar had no right to execute the gift deed in favour of plaintiff. Hence, plaintiff has no right over the property.

27. The learned counsel for respondents has further submitted that defendants have produced original will; they examined attesting witnesses and complied Section 63 of Indian Succession Act, and Section 68 of Indian Evidence Act. Required evidence was led to prove the will.



Merely, because there were no entries in the revenue records in the name of A.B.Narayana is not sufficient to reject it. The heavy burden is on the plaintiff to prove its case. They cannot get the decree on the basis of weakness of the defendant's case. Plaintiffs/appellants have failed to prove their case, hence, they are not entitled for the decree. With these reasons, the learned counsel for the respondents prayed for dismissing the appeal.

28. In reply, learned counsel for appellants would submit that most of the arguments advanced by the respondents are without pleadings and cannot be considered. Late. Appi Hengsu had no right to revoke, the trust. For the sake of discussion, even if it is considered that under Section 78 of Indian Trust Act, she had right to revoke, it shall be in writing since original trust deed itself is in writing and is a registered document. There are several suspicious circumstances surrounding the will. The attesting witnesses were not close relatives or friends of



Smt. Appi Hengsu and on the contrary, they are close friends of A.B. Narayana. The witnesses to the will and permanent lease are one and the same. It also shows that they were friends of A.B. Narayana and only to help him, their signatures are obtained on the alleged will. The will did not see the light of the day till the suit was filed and there is no explanation for the same. Therefore, the trial court rightly rejected the will as well as permanent lease deed executed in favour of defendant No.2. It does not call for any interference. With these reasons, he prayed for allowing the appeal and decreeing the suit.

29. We have perused the materials placed before us.

30. Following facts are not in dispute, which can be borne out from the records;

- Smt. Appi Hengsu purchased suit properties. Smt. Kalyani Shetty W/o Balakrishna Shetty had executed registered sale deed dated 05.02.1975 in respect of survey No.264 measuring 8 ½ cents as



well as survey No.262/1B measuring 1½ cents in
favour of

Smt. Appi Hengsu. Smt. Appi Hengsu purchased
survey No.264 measuring 15 cents from Dr. M.
Venugopala Shetty by registered sale deed dated
05.02.1975.

- Appi Hengsu was absolute owner of the above said
landed property and house was situated in the
above said property.
- Appi Hengsu had four children i.e. Ramesh, Nanda,
Ahalya and Sanjeeva.
- Appi Hengsu died during the year 1983.
- Appi Hengsu had executed and created a family
trust in respect of suit properties by trust deed
dated 16.05.1981 and as per the said trust deed
benefit of the property should go to her lineal
descendants.
- A.N. Ramesh S/o Appi Hengsu was the first trustee.



- Smt. Nanda had a son by name Sathish and he has been residing abroad. He declined to accept trusteeship.
- Sri. Navaneeth Kumar is the son of another daughter of Smt. Appi Hengsu by name Smt.Ahalya.

Smt. Ahalya as well as Navaneeth Kumar were residents of Mangaluru.

- Late A.B. Narayana was residing in the suit property during life time of Appi Hengsu along with her and continued his possession after her death also.

31. Plaintiff has produced certified copies of the sale deeds at Exs.P1 and P2, trust deed at Ex.P3, assessment list of the buildings and lands maintained by Mangaluru City Corporation Ex.P16, which is standing in the name of Late Appi Hengsu. RTC's of vendors of Late. Appi Hengsu in respect of suit property are at Exs.P14 and 15. These documents are not in serious dispute.



32. Main dispute is whether Navaneeth Kumar had any authority to become trustee. PW.1 is one of the trustees of plaintiff – trust. In his evidence, he has reiterated the plaint averments and relevant documents were marked in his evidence. In his evidence, he has stated that the first trustee was Sri.A.N.Ramesh. After the death of Ramesh, son of Nanda by name Sathish declined the trusteeship and hence Navaneeth Kumar, the elder son of Ahalya – another daughter of Appi Hengsu became the trustee. He was thoroughly cross-examined in this regard. He denied the suggestion that Navaneeth Kumar had no right to become the trustee and he was not a trustee of the said trust.

33. It is pertinent to note that Navaneeth Kumar was elder son of Smt. Ahalya was not disputed. Mr. Sathish, son of Smt.Nanda declined to accept the trusteeship is also not disputed. There were no suggestions regarding children of Sanjeeva S/o of Late. Appi Hengsu. PW2 is family member of Appi Hengsu. In



his cross-examination, it was brought out that the said Sanjeeva had two daughters and one son, but it was not brought out that son of Sanjeeva was elder to Navaneeth Kumar. In the cross-examination of PW-2, genealogy of the family has not been disputed. During the cross-examination of plaintiff's witnesses, it was brought out that Sanjeeva and his family were residing in African country and Sanjeeva was dead. Therefore, the only lineal male descendant to be appointed as trustee was Navaneeth Kumar. There are no reasons to discard evidence of plaintiff that Navaneeth Kumar became trustee and his competence to act as trustee in terms of trust deed.

34. It was a family trust. Defendants have no role in management and administration of trust. The family members of Appi Hengsu had only right to challenge the appointment of Navaneeth Kumar as trustee. It is not in dispute that none of the family members have challenged appointment of Navaneeth Kumar as trustee or execution



of gift deed in favour of plaintiff by him. There were no reasons to discard evidences led by the plaintiff to prove that Navaneeth Kumar was trustee and he had executed the gift deed in favour of plaintiff trust. Hence, finding of the trial court in this regard is erroneous and perverse.

35. The plaintiffs' witnesses have repeatedly stated that Navaneeth Kumar was the trustee and he executed registered gift deed in favour of plaintiff- trust. Execution of the gift deed was not disputed by Navaneeth Kumar. Original gift deed executed by Navaneeth Kumar in favour of plaintiff, is produced before the Court at Ex.P.10. One of the attesting witnesses was examined as PW-2. He is the member of family of Navaneeth Kumar. He has stated about execution and registration of said document. In the cross-examination of PW-2, nothing was brought out to disbelieve his evidence and his evidence is reliable.

36. None of the legal heirs of Smt.Appi Hengsu have challenged Ex.P-10 or authority of Navaneeth Kumar to execute the same. The defendants are strangers to the



property of trust. Defendant No.2 is not lineal descendant of Appi Hengsu. Under these circumstances, they have no legal right to challenge the authority of Navaneeth Kumar to execute the gift deed.

37. The recitals of the trust deed created by Appi Hengsu gives an authority to transfer of the property. As mentioned in paragraph No.8 of Ex.P3, there was no hurdle to the said Navaneeth Kumar to transfer the title of subject matter of the trust with the consent of other lineal descendants. Smt. Nanda and Smt. Ahalya consented for transfer of the property by executing consent letters before notary. The very same paragraph of Ex.P3 also indicates that no other beneficiary shall have right to object to the transfer. Hence, defendants have no right to question the said transfer. The findings of the learned trial judge contrary to the same is not tenable.

38. The defense of defendant No.2 is that Appi Hengsu had executed will in favour of his father Sri. A.B. Narayana and bequeathed suit property in his



favour. The said will is produced at Ex.D37 dated 15.10.1982. One Vishwanath Suvarna – DW-3 and another Vishwanath S/o Thimmappa were attesting witnesses and it was scribed by Sri. Narasimha Prabhu. As noted by the trial court, the will has got several suspicious circumstances, which was not cleared by the propounder of the will. A.B. Narayana was younger brother of Appi Hengsu. He was residing with Late. Appi Hengsu in suit property till his death. He was a witness to the trust deed and he signed at Ex.P3(c). Ex.P3 is registered trust deed executed on 16.05.1981. Ex.D37 – will was said to be executed on 15.10.1982. There is no reference to creation of the trust by Appi Hengsu in the will and no reasons are assigned to ignore said trust created for the benefit of members of her family. This creates doubt about execution of will.

39. Late. A.B. Narayana was younger brother of Appi Hengsu. In the will, it is mentioned that he was her son and there is no explanation in this regard. At the time



of execution of the alleged will, the children of Appi Hengsu were alive. In this will, the reasons for excluding the natural heirs and special reasons for bequeath in favour of A.B. Narayana are not mentioned. Only reasons mentioned is all her sons and daughters are well settled with their respective families. If that was the case, then she would not have executed Ex.P3. Execution of Ex.P3 makes it clear that Appi Hengsu intended that her lineal descendants should succeed to the property.

40. The attesters of the will are not her close friends or close relatives and they appear to be strangers. One of the attesting witnesses i.e. DW-3 during his evidence has stated that his father and A.B. Narayana were close friends. He used to frequently meet A.B. Narayana in his house and one day Appi Hengsu called him to her house and told him her intention to execute will and she got prepared a will through Narasimha Prabhu as per Ex.D37. It was read over to her and she accepted and signed on



the said will, thereafter, he and another witness have signed; thereafter, it was signed by the scribe.

41. In the cross-examination, he pleads ignorance about name of husband of Appi Hengsu as well as name of her mother and her sisters. He does not know when Appi Hengsu died. He was aged 20 years at the time of attesting will. He has stated that children of Appi Hengsu were also residing with her in the said house, which is incorrect.

42. DW-3 in his cross-examination states that a draft of the will was prepared. Before finalising the same, it was given to late Appi Hengsu by the scribe; she read over and approved it, thereafter, Ex.D37 was written. He did not read the draft will. He does not know what were the documents given to scribe by Appi Hengsu at the time of drafting the will. He does not know, who told survey numbers of the property at the time of drafting of the will. Even he does not know whether the children of Appi Hengsu were present at the time of execution of the will at



her house. The evidence of DW-3 does not inspire confidence in the mind of prudent person to believe his presence at the time of execution of the will or attesting the will at the request of Appi Hengsu. He was aged about 20 years and Appi Hengsu was aged about 70 years. He did not explain as to how deceased Appi Hengsu came in contact with him or acquainted with him or she had confidence on him. According to Ex.D37, children of Appi Hengsu were well settled with their respective family and A.B. Narayana alone was looking after her; Contrary to the same, DW3 says that her children were residing with her in the very same house at the time of execution of the will. If they were residing with her and looking after her, then why did she execute the will in favour of her younger brother? This is not explained. The other attesting witness as well as scribe were not examined. The scribe was reported to be dead during the trial of this case. Moreover, DW3 in his cross examination admits that his father was close friend of A.B. Narayana; He witnessed general power of attorney executed by A.B. Narayana in



favour of Shashikantha, who executed transfer deeds in favour of defendant No.2 and on behalf of A.B. Narayana. His evidence leads to an interference that he is a planted witness to the said will.

43. It is worth to note that after the death of Appi Hengsu during the life of A.B. Narayana, he did not try to change the revenue records of the suit property to his name. There is no explanation for the same. The will came to light only after filing of the present suit. It also creates serious doubt regarding execution of the will. The trial court has considered these facts in detail and rightly disbelieved the will executed by Appi Hengsu in favour of A.B. Narayana. It does not call for any interference.

44. A.B. Narayana executed transfer of permanent lease deed as well as Mooli right in favour of defendant No.2 only on the basis of the said will. The will itself is not proved. Hence, Late. A.B. Narayana had no right, title or interest over the suit property, to transfer the very same property under registered transfer deed to defendant



No.2. Defendant No.2 would not get any right or title by virtue of said registered documents over the suit schedule property. The defendant No.2 was not at all the owner of the property as on the date of execution of sale deed. He had no right to transfer the title of the schedule property in favour of defendant No.1. Both late A.B. Narayana and defendant No.2 were in permissive possession of the schedule property. The name of defendant No.2 was mutated in the revenue records by virtue of defective sale deed and it does not confer any right, title or interest over the suit schedule property in favour of defendant No.2. Hence, defendant Nos.1 and 2 had no right over the schedule property.

45. After the death of Appi Hengsu, A.B. Narayana did not file suit for declaration of the title over the schedule property by virtue of the will alleged to be executed in his favour. There are no materials on record to show that execution of the will was known to legal heirs of Appi Hengsu. Defendant No.2 had produced alleged



affidavit of Smt. Ahalya and Smt. Nanda at Exs.D35 and D36. Both the documents bear signatures said to be of Smt. Nanda and Smt. Ahalya in Kannada. The records produced by the plaintiffs would show that both of them used to sign in English language. There is no reference regarding the execution of the trust deed in the affidavit, which was known to them. Both Exs.D35 and 36 contains glaring mistakes about age and residence of both. These facts create doubt about genuineness of the said affidavit. Moreover, defendants failed to prove the will and hence Exs.D35 and 36 will not come to their rescue.

46. The defendants have not challenged the finding on the issues against them. Even if we re-consider and re-appreciate their case under Order XLI Rule 22 of CPC, in view of the above reasons, defendants are unable to prove that Appi Hengsu executed a will in favour of A.B. Narayana.



47. Plaintiffs proved title over the schedule property. The defendants fail to prove their title over the property. Admittedly, the defendant were in permissive possession of the schedule property as on the date of the suit. The suit is filed for relief of declaration and possession. Plaintiffs being owner of the schedule property are entitled for possession of the suit property. The learned trial Judge erroneously dismissed the suit without proper reasons that call for interference by this court.

48. For the above said reasons, we pass the following:

ORDER

The appeal is ***allowed***, with costs.

The judgment and decree passed in O.S.No.344/2004 dated 23.11.2015 by the II Additional Senior Civil Judge, Mangaluru, Dakshina Kannada is set aside.



The suit is decreed. Plaintiff No.1/trust is declared as the absolute owner of the 'A' schedule property and defendants are directed to vacate and hand over vacant possession of the schedule property in favour of plaintiff/trust within a period of two months from the date of this judgment, failing which, the plaintiffs are at liberty to get possession of the property through process of law.

Relief of mesne profits is kept open to be decided in an appropriate proceedings.

Registry is directed to send back the trial court records.

**Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE**

**Sd/-
(UMESH M ADIGA)
JUDGE**

AG