

*THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+APPEAL SUIT No.242 of 2008 and
CROSS-OBJECTIONS (SR) No.4246 of 2008

% 10-08-2018

#Kunchakurthy Veera Sangaiah
and others ... Appellants

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\$G. Sakunthala (since died)
represented by her
legal representatives
and others ... Respondents

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>HEAD NOTE:

! COUNSEL FOR THE APPELLANTS: Mr. B. Nalin Kumar

^ COUNSEL FOR RESPONDENT NOS.2 to 22: Mr. N. Vijay
COUNSEL FOR RESPONDENT NOS.23 to 28: Mr. M.
Rajamalla Reddy

? CASES REFERRED:

1. 1962 KLJ 867
2. AIR 2004 SC 1893
3. (2009) 4 SCC 780
4. (1995) 2 SCC 543
5. 2007 (6) ALD 348 (DB)
6. AIR 1955 SC 346
7. AIR 1929 Patna 401
8. 1881(6) Cal. 17
9. 1888 (11) Cal. 429
10. 1900(27) Cal. 169
11. AIR 1922 Patna 402
12. AIR 2002 SC 637 = (2002) 2 SCC 85
13. (1987) 1 SCC 690
14. (2017) 9 SCC 332
15. 1995(2) SCC 543

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DATED: 10-08-2018

Between:

Kunchakurthy Veera Sangaiah
and others ... Appellants

And

G. Sakunthala (since died)
represented by her
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and others ... Respondents

COUNSEL FOR THE APPELLANTS: Mr. B. Nalin Kumar

COUNSEL FOR RESPONDENT NOS.2 to 22: Mr. N. Vijay

COUNSEL FOR RESPONDENT NOS.23 to 28: Mr. M.
Rajamalla Reddy

THE COURT MADE THE FOLLOWING:

JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

Defendant Nos.1, 4, 5, 6, 8, 9 and 10 in O.S.No.2 of 2002 filed this appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) read with Order XLI of CPC, feeling aggrieved by judgment dt.29.01.2008 in the said suit, on the file of the Principal District Judge, Medak, at Sangareddy.

2. Respondent No.1 (since died) presently represented by respondent Nos.23 to 28, filed the cross-objections in respect of item No.3 of the plaint schedule properties allotting the said item to the shares of appellant Nos.1 and 5 to 7, for being allotted to their purchasers, who are defendant Nos.11 to 28. For convenience, the parties are referred to as they are arrayed in the suit.

3. Brief facts leading to the filing of this appeal are that late K. Veeraiah (hereinafter referred to as "the testator") is the original owner of the plaint schedule properties comprising A to C schedules. Defendant No.1 is the son, and the plaintiff and defendant No.2 are the daughters of the testator. The testator died on 19.12.1990 allegedly leaving behind a Will, which is the source of the litigation between the plaintiff and defendant Nos.1 and 8 to 10. The plaintiff married long prior to the death of her father. In February 2002, she filed the suit

for partition of the suit schedule properties into three shares and allotment of one such share to her. The suit was originally filed against defendant Nos.1 and 2 only. During the pendency of the suit, defendant Nos.1 and 2 died. Hence, defendant Nos.8 to 10, sons of defendant No.1, defendant Nos.4 to 7, children of defendant No.2, were impleaded. Defendant Nos.3 and defendant Nos.11 to 28, the alleged third party purchasers of the property also came on record. The basis for the claim of the plaintiff for partition was that the suit schedule properties were self-acquired properties of her father K. Veereaiah, who died intestate and that therefore she succeeded to 1/3rd share of her father.

4. Defendant No.1 filed a written statement wherein he has averred that during his father's life time, he executed a Will dt.14.05.1984 bequeathing the suit schedule properties and also certain other properties in his and also in favour of his three sons, i.e., defendant Nos.8 to 10, and that by virtue of the said Will they became absolute owners of the suit schedule properties without any right, title or interest in the plaintiff. He further averred that subsequent to the execution of the said Will, the testator has sold Ac.5.28 guntas in Sy. No.107 of Chintapalli, that in the year 1985 the testator has divided the

remaining properties into four shares and gave one such share to each of the four defendants, i.e., defendant Nos.1 and 8 to 10, that in accordance with the said division, the testator also applied to the revenue authorities on 25.06.1989 to mutate the names of the defendants in the record of rights and that their names were accordingly mutated and since then they have been in exclusive possession and enjoyment of their respective shares to the exclusion of other legal heirs of the testator.

5. Defendant No.3 filed a written statement stating that after verifying the revenue records and on being satisfied with the genuine ownership and possession of defendant Nos.1 and 8 to 10, he entered into an agreement of sale on 07.10.2001 in respect of item No.3 of the plaint A schedule land for the purpose of plotting the same into house sites and sold the plots to various persons duly registering the same in favour of the said purchasers through defendant Nos.1 and 8 to 10. That therefore, the plaintiff cannot claim any right, title or ownership over the said land.

6. The plaintiff filed a rejoinder terming the Will deed as a fabricated document brought into existence to knock away the suit schedule properties and that the revenue records were manipulated based on such false document.

7. Based on the respective pleadings of the parties, the lower Court framed the following issues:

“Issue No.1: Whether Late K. Veeraiah executed will deed Dated 14-5-1984 bequeathing the suit schedule properties in favour of the defendant No.1, and 8 to 10?

Issue No.2: Whether Late K. Veeraiah divided the suit schedule properties and gifted the same in favour of the defendant No.1 and 8 to 10 in 1985?

Issue No.3: Whether the applications filed by Late K. Veeraiah before ROR authorities requesting to mutate the name of Defendant No.1 and 8 to 10 in respect of the suit schedule properties amounts to an admission of factum of transfer and binding on the plaintiff?

Issue No.4: Whether the applications by Late K. Veeraiah requesting to transfer of the suit land in favour of the defendant Nos.1 and 8 to 10 estops the plaintiff from challenging the said application/statements?

Issue No.5: Whether the defendant Nos.1 and 8 to 10 have been in exclusive possession and enjoyment of their respective properties after gifts, hostile and adverse to the plaintiff and whether the defendant Nos.1 and 8 to 10 perfected their title by adverse possession in respect of the suit properties?

Issue No.6: Whether the plaintiff paid proper court fee?

Issue No.7: Whether the plaintiff is entitled for partition?

Issue No.8: Whether equities can be worked out in respect of the suit land in Sy.No.383 purchased by the defendant Nos.2 to 7 and 11 to 28?”

8. The Court below, however, in its judgment restructured the issues as under:

“Issue No.1: Whether Late K. Veeraiah executed will deed dated 4-5-1984 bequeathing the suit schedule properties in favour of the defendant No.1 and 8 to 10?

Issue No.2: Whether Late K. Veeraiah divided the suit schedule properties in 1985 and whether consequently he applied for mutation of these divisions in favour of defendant Nos.1, 8, 9 and 10?

Issue No.3: Whether the defendant No.1 and 8 to 10 have been in exclusive possession and enjoyment of their respective properties, after gifts, hostile and adverse to the plaintiff and whether the defendant Nos.1 and 8 to 10 perfected their title by adverse possession in respect of the suit properties?

Issue No.4: Whether the claim of the plaintiff is not barred by limitation and if so, whether she is entitled for partition?

Issue No.5: Whether equities can be worked out in respect of the suit land in Sy. No.383 purchased by the Defendant Nos.11 to 28?

Issue No.6: To what relief?”

9. In support of her case, the plaintiff examined herself as P.W.1 and got Exs.A.1 to A.36 marked. On the defendants' side, D.Ws.1 to 8 were examined and Exs.B.1 to B.55 were marked. On appreciation of the oral and documentary evidence, the lower Court answered the reframed Issue Nos.1 to 4 in favour of the plaintiff and against the defendants. As regards issue No.5, it has allotted item No.3 of schedule –A land to the extent of Acs.11.12 guntas to defendant Nos.1, and 8 to 10, vendors of defendant Nos.11 to 28, while observing that the Court can work out equities while allotting Ac.12.01 guntas of land towards 1/3rd share of the plaintiff in the final decree proceedings. A preliminary decree was accordingly passed.

10. At the hearing, Mr. B. Nalinkumar, learned counsel appearing for defendant Nos.1 and 8 to 10, submitted that though D.Ws.2 and 3 have not attested the Will proper, they have attested on the sealed cover of the Will which was signed by the testator in their presence. He further submitted that in the light of the evidence of D.Ws.2 and 3 that the testator has signed the Will in their presence, the requirements of Section 63(a) of the Indian Succession Act, 1925 (for short, “the Succession Act”) were satisfied and that by examining the said

two witnesses defendant Nos.1 and 8 to 10 have also complied with the legislative mandate of proving the document by examining at least one attesting witness. In support of his submission, he has placed reliance on the judgment in **Kurian v. Martha**¹.

11. Mr. N. Vijay, learned counsel appearing for defendant Nos.3 and 11 to 28, while supporting the submissions of Mr. B. Nalinkumar, placed heavy reliance on clause (c) of Section 63 of the Succession Act and submitted that under the said provision, it is not necessary that the witnesses must see the testator sign and that it is sufficient if the testator personally acknowledged his signature and mark evidencing his signing the Will. That in the present case D.Ws.2 and 3 have categorically stated that the testator has signed the Will in their presence and after the testator placed the same in the sealed cover both the witnesses have attested on the cover of the Will, which amounts to the witnesses attesting the Will itself. In other words, the learned counsel submitted that the sealed cover in which the Will is kept and deposited with the Registrar must also be treated as a part of the Will and that the lower Court has committed a serious error in holding that the Will is not

¹ 1962 KLJ 867

valid as it was not attested by two witnesses. Referring to the findings on issue Nos.3 and 4, both the learned counsel appearing for the defendants submitted that as per the admission of the plaintiff, examined as P.W.1, since five years prior to the death of her father defendant Nos.1 and 2 to 8 were exclusively cultivating the lands and managing agricultural activities, that therefore the limitation of filing the suit commenced in the year 1985 and expired in 1997 and that accordingly the suit is barred by limitation. In support of their submission the learned counsel relied upon Articles 65 and 110 of the Limitation Act, 1963 and the judgment in **Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak**².

12. Countering the above submissions, Mr. M. Rajamalla Reddy, learned counsel for the plaintiff, referred to and relied upon Sections 42 and 43 of the Registration Act, 1908, and submitted that by signing on the cover, which was presented by the testator for the purpose of depositing the Will, D.Ws.2 and 3 have testified to the identity of the testator, that accordingly they were the identifying witnesses and not the attesting witnesses, that as the Will was not attested by at least two witnesses as envisaged by Section 63(c) of the Succession

² AIR 2004 SC 1893

Act, it was not a valid Will and that therefore the lower Court has rightly discarded the same. In support of his submission, the learned counsel has relied upon the judgment in **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh**³.

As regards the adverse possession and the plea of limitation advanced for the defendants, the learned counsel submitted that the Court below has rightly held that the right to sue accrued with the death of the original owner and that the suit was filed within the period of twelve years from the date of accrual of such right. In support of his submission, he relied upon the judgment in **Annasaheb Bapusaheb Patil v. Balwant**⁴. Referring to the documentary evidence produced by both the parties, such as, record of rights and pahanies, the learned counsel submitted that for the first time in 1993-94, the names of defendant Nos.1 and 8 to 10 were entered and that the suit was filed within twelve years therefrom. He has also argued that issue of notice before mutation is mandatory and that in the absence of such notice, adverse possession cannot be claimed. In support of his submission, the learned counsel relied upon the judgment of the Full Bench of this Court in **Chinnam Pandurangam v. Mandal Revenue Officer,**

³ (2009) 4 SCC 780

⁴ (1995) 2 SCC 543

Serilingampally Mandal⁵. Advancing his submission on cross-objections, the learned counsel submitted that item No.3 of plaint-A schedule property is the most prime property whose value exceeds the value of all other properties put together.

13. Having regard to the respective submissions of the learned counsel for the parties, the following points emerge for consideration.

- (i) “Whether the Will set up by defendant Nos.1 and 8 to 10 is valid in law?
- (ii) Whether the plaintiff was ousted from possession for a statutory period of twelve years and the suit is barred by limitation?
- (iii) Whether the allotment of item No.3 of the plaint –A schedule property in favour of defendant Nos.1 and 8 to 10 by the lower Court is sustainable?

Re point (i):

14. The word “Will” is defined by Section 2(h) of the Succession Act as under :

“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.”

⁵ 2007 (6) ALD 348 (DB)

15. Section 63 of the Succession Act deals with execution of unprivileged wills. It reads as follows:

“63. Execution of unprivileged Wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airmen so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or 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 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.”

16. In **Yumnam Ongbi Tampha Ibema Devi** (3-supra) the Supreme Court while dealing with the importance of

attestation of Will, with reference to Section 63 of the Succession Act, observed as under:

“11. As per provisions of Section 63 of the Succession Act, for the due execution of a will:

- (1) the testator should sign or affix his mark to the will;
- (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;
- (3) the will should be attested by two or more witnesses, and
- (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.”

“12. The attestation of the will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (*sic* attesting) witness should put his signature on the will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.”

“13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will

but also that each of the witnesses had signed the will in the presence of the testator.”

17. It is not in dispute that D.Ws.2 and 3, who are the attestors, have not signed the Will. They have, however, deposed that they were called to the Registrar’s Office when they were at their homes, where the testator has signed the Will deed and also affixed his thumb impression in the presence of the Registration Officer and then kept the same in the envelope and sealed it. It could be culled out from the evidence of D.Ws.2 and 3 that the testator has signed the document in their presence and put his thumb impression on it. They also admitted that they only attested the contents superscribed on Ex.B.45 cover.

18. In **Girija Datt Singh Vs. Gangotri Datt Singh**⁶, a three Judge Bench of the Supreme Court discussed the requirements of Section 63 of the Succession Act 1925 with particular reference to attestation of a will by two attestors and observed as under :

“.....In order to prove the due attestation of the will Ex.A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri

⁶ AIR 1955 SC 346

Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased” (Emphasis added)

19. The facts in **Girija Dutt Singh (6-supra)** vary with that of the case on hand as in the former case the attestors attested the will but their evidence that they have seen the testator sign the will was not believed. However, the case decided by the Division Bench of Patna High Court in **Umakanta Das Bairiganjan Bhuyan Mahapatra Vs. Biswambhar Das Mahapatra**⁷ as far back as 1929 bear similarity with the facts of the present case on hand. In that case also the attesting witnesses have not signed on the will proper. As in the present case, the testator, after executing the will, put it in a sealed cover and deposited it with the Registrar under Section 42 of the Registration Act with the following endorsement in Oriya on the cover :

“I, Sri Balbhadra Prasad Das Bairiganjan Bhuyan Mahapatra, of mauza Mangalpur Samil mouza Gopinathpur, pargana Banchas, district Balasore, do execute this last will, Finis. The legatees are No.1 Sri Tikayat Babu Umakanta Das Mahapatra, No.2 Sri Babu Biswambhar Das Mahapatra, No.3 Sri Babu Nityanand Das Mahapatra and No.4 Sri Babu Sachidananda Mahapatra, who are my (Balbhadraprasad Das Bairiganjan Bhuyan Mahapatra’s) sons, Dated 14th December 1916.”

⁷ AIR 1929 Patna 401

Below the signature of the testator, an endorsement in English was made by the Sub-Registrar, which reads as follows:

“Presented this 14th December 1916, at 1 p.m. by Balbhadraprasad Das Bairiganjan Bhuyan Mahapatra, son of Raghunath Das Rajkumar Bairiganjan Bhuyan Mahapatra of Mangalpur samil mauza Gopinathpur, pargana Banchas, thana Soro, by caste Karan, by profession zamindar, who is identified by Babu Hem Chandra De, Pleader, Balasore.”

The said endorsement made by the Sub-Registrar did not bear any signature. There was however, a signature, on the margin, of the testator, and below it, the Pleader Babu Hem Chandra De, signed. The superscription on the cover was copied by the Registrar in his Register No.5 and the same was signed by him.

20. The propounder of the will submitted before the Court that the scribe Nilamber Pattnaik, the pleader Hem Chandra De and the Sub-Registrar were all attesting witnesses to the will. The District Court rejected the said contention and held that the scribe did not purport to have attested the will as a witness. The Court also observed that even assuming that the scribe signed the document not only as the scribe but also as an attesting witness, the law requires that the will must be attested by two or more witnesses each of whom must have seen the testator sign and affix his mark to the will or must have

received from the testator a personal acknowledgement of his signature or mark, and each of the witnesses must sign the will in the presence of the testator and that these facts have not been proved in that case. As regards the signature of the Sub-Registrar, it was contended that the endorsement on the cover containing the will must be taken to be a part of the will and further that the acknowledgement of the testator before the Sub-Registrar and the pleader Babu Hem Chandra De to the effect that the document contained in the cover was his will and that he executed the same and followed by the signature of the Sub-Registrar and of the pleader would be a sufficient compliance with the provisions of Section 50 of the Indian Succession Act 1865 (corresponding to Section 63 of Succession Act 1925) and that the Sub-Registrar and the Pleader must be considered to be the attesting witnesses. While rejecting this submission, the District Judge observed :

“.....It is extremely doubtful whether the cover in which the will was placed and which was presented to the Sub-Registrar for deposit under Section 42, Registration Act can be treated as a part of the will.....”

The High Court, however, relied upon certain Judgments, which incidentally raised a similar issue as in the present case. These Judgments bearing the facts as discussed by the Patna

High Court in **Umakanta Das Vs. Biswambhar (7-supra)** are discussed hereunder.

21. In **Hurro Sundari Dabia Vs. Chander Kant Bhattacharjee**⁸, the testatrix admitted the signature on the will to be her's before the Registrar of Assurances and was identified before him by one of the witnesses to the signature and both the Registrar and the identifier signed their names as witnesses to the admission. Garth, C.J., and Mitter, J held that such an attestation was a sufficient compliance of Section 50 of the Succession Act 1865. Another Division Bench, in **Nitye Gopal Sircar Vs. Nagendranath Mitter**⁹ held that the admission of execution of will before the Registrar and his signature on the endorsement of registration was held to be attestation of the will. In **Amarendranath Chatterji Vs. Kashi Nath Chatterji**¹⁰, the registration of a will by the testator and his signature to the certificate of admission of execution testified by the signatures of the Sub-Registrar and of a witness was held sufficient attestation to satisfy the requirements of Section 50 of Succession Act 1865. After referring to the above referred Judgments and also some other cases, the Patna

⁸ 1881(6) Cal. 17

⁹ 1888 (11) Cal. 429

¹⁰ 1900(27) Cal. 169

High Court, in **Sarada Prasad Vs. Trigunacharan Ray**¹¹ held that the signature of the Registrar to the endorsement of admission of the will by the testator was a sufficient compliance in respect of attestation of a will as required by Section 50 of the 1865 Act. Upon discussing the above case law, the Division Bench, in **Umakanta Das (7-supra)** observed as under :

“ There is therefore, considerable force in the argument of the learned advocate for the appellant in support of the view that the signature of the pleader on the cover containing the will should be regarded as the signature of an attesting witness although he signed the endorsement made by the Registrar as an identifier and not the endorsement in Oriya characters and the signature of the testator appearing on the cover....”

(Emphasis added)

22. In **Yumnam Ongbi (3-supra)** the dispute as arising in the present case, namely, whether attestation on the cover constitutes attestation of the will did not arise. No Judgment has been cited laying down any contra opinion to the one expressed in the above mentioned Judgments of the Calcutta and Patna High Courts on the subject issue as arising in this case. It can be deduced from these Judgments that what is important is that the testator must sign the will in the presence of at least two witnesses. The Courts, in the said Judgments,

¹¹ AIR 1922 Patna 402

however, adopted a liberal approach in treating the attestation on the cover in which the will is placed at the time of registration and deposit of the cover as sufficient compliance of Section 50 of the Succession Act 1865 which is in pari materia with Section 63 of the Indian Succession Act 1925, if the testator signed the will in the presence of the attestors of the cover of the will.

23. In the present case on hand, the testimony of DW-2 and DW-3 clearly reveals that the testator has signed on the will in their presence and requested them to sign on the cover after placing the will inside and sealed the cover. In this fact-situation, we respectfully follow the ratio discussed in the above Judgments of the Calcutta and Patna High Courts and hold that the attestation on the cover - Ex.B-45 amounts to attestation of the will.

24. The further question however remains is whether even if the will is shown to have been properly attested, the same satisfies the other legal tests for a valid will ?

25. In order that a will stands the judicial scrutiny, it must overcome suspicious circumstances. In **Madhukar D. Shende Vs. Tarabai Aba Shedage**¹², at paras 8 and 9, the Supreme

¹² AIR 2002 SC 637 = (2002) 2 SCC 85

Court made a luminous exposition of legal position on the requirement of proof of a will. We can do no better than reproducing the relevant portion of the opinion herein below :

“The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R Vs. Hodge* 1838 2 LCC 227 may be apposite to some extent. “The mind was apt to make a pleasure in adapting circumstances to one another and even in straining them a title, if need be, to force them to form parts of one connected whole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.” The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion

may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict – positive or negative.

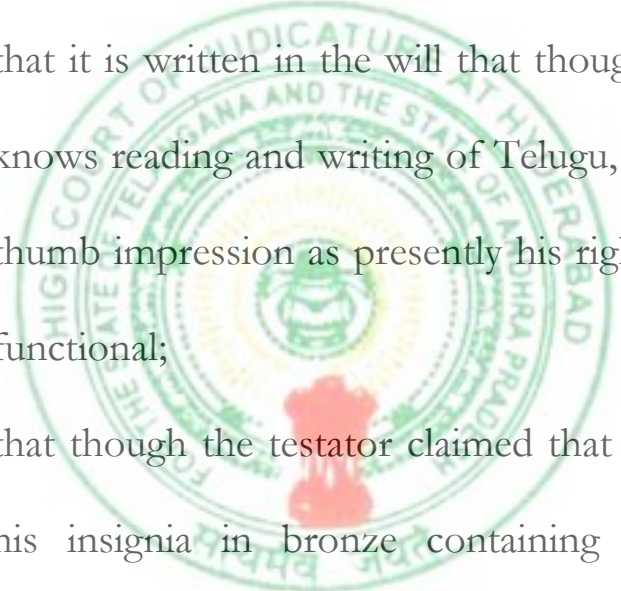
It is well settled that the one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of ‘not proved’ merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.”

26. Uneven disposition of property or denial of property to one or more family members is treated as a suspicious circumstance in considering the legality of a will. In **Malkani Jamadar**¹³ the testator has settled the property in favour of his nephew as against his married daughter. The Supreme Court held that the will suffers from suspicious circumstances due to disinheritance among the heirs of equal degree and the testator has not explained the reason for exclusion of such a legal heir.

¹³ (1987) 1 SCC 690

27. In **Prakash Soni Vs. Deepak Kumar**¹⁴, the Supreme Court held that presence of suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator.

28. The lower Court examined the contents of the will and noted certain aspects which create suspicious circumstances viz.,

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- (i) that it is written in the will that though the testator knows reading and writing of Telugu, he affixed his thumb impression as presently his right hand is not functional;
 - (ii) that though the testator claimed that he has placed his insignia in bronze containing his name in English on the will, the same is not found on the will;
 - (iii) that there was no date on any page of the will;
 - (iv) that it is not clear when exactly the will deed was typed;
 - (v) that defendant No.1 himself pleaded that his father sold Ac.5-28 guntas in Sy.No.107, which is a part of

¹⁴ (2017) 9 SCC 332

the properties conveyed under the will, subsequent to the execution of will; and

- (vi) that the disposition under the will only in favour of the son and grand sons of the testator ignoring the plaintiff and defendant No.2, the daughters of the testator, is ex facie unfair.

29. In addition to the above shortcomings, we notice the following deficiencies:

D.W.2 deposed that there was no endorsement on Ex.B.45 that 'the testator has executed the Will in full state of consciousness and with his free will and that he has voluntarily signed on Ex.B.45'. He has also admitted that the Will deed was not read over to him and the other attesting witness and that the testator orally informed him about the contents. It could thus be seen that the attestors were not aware whether the testator **executed and signed the will** with his free will without being influenced by the legatees under the will.

In his cross-examination, D.W.3 deposed that he went to the Registrar's office on being called by the testator who informed him that he has to attest on the cover in which the testator was keeping the **Notenama** and sealing it, that the note was contained in Telugu typed matter and that he does not

know the contents of the typed matter. He further deposed that he did not enquire from the testator the nature of the property or the document being kept in the sealed cover. While stating that he was at the Registrar's office for five minutes, the witness admitted that there was no endorsement on Ex.B.45 showing the nature of the document kept in the sealed cover, that the Will Deed was not read over to himself and to D.W.2 and that the attestor orally informed them.

Though the plaintiff and defendant No.2 are the daughters of the testator, neither any property was given to them nor the testator offered any explanation in the will for completely disinheriting them. The learned counsel for the appellants and those respondents who sailed with them in this appeal have not advanced any submissions on these aspects. Even though they succeeded in convincing this court that the will is duly attested, the above noted features in general and the failure of the testator to make any provision in favour of his two daughters in particular, constitute strong suspicious circumstances to disbelieve the will. Therefore, we are of the opinion that the will propounded by the appellants does not stand the legal tests to deny the plaintiff of her share in the

properties left by her father. This Point is accordingly held against the appellants.

30. Re Point (ii): The Court below has found that Ex.B-1 receipt issued by the Mandal Revenue Inspector shows that the defendants paid the land revenue in 1989 itself. It referred to Ex.A-8 – ROR for the years 1989 to 1997 showing the names of defendant Nos.1, 8, 9 and 10 and concluded that the defendants are holding the lands to the exclusion of the plaintiff. The lower Court taking into consideration the fact that as K. Veeraiah, the father of the plaintiff died on 19-12-1990 held that limitation of 12 years began to run from the said date and expired on 18-12-2002 and that the suit having been filed on 13-2-2002, was within the period of limitation.

31. Under Article 65 of the Limitation Act, the period of limitation of 12 years for filing a suit for possession of immovable property or any interest therein based on title begins to run when the possession of the defendants becomes adverse to the plaintiff. In **Annasaheb Bapusaheb Patil Vs.**

Balwant¹⁵, the Supreme Court, at para-16, held as under :

“In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the

¹⁵ 1995(2) SCC 543

coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of a family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. The right of the plaintiff to file suit for partition had arisen after the Act has come into force and re-grant was made by the Collector under sub-section (1) of Section 5. The defendant, therefore, must plead and prove that after the re-grant, he asserted his own exclusive right, title and interest to the plaint schedule property to the knowledge of the plaintiff and the latter acquiesced to such a hostile exercise of the right and allowed the defendant to remain in continuous possession and enjoyment of the property in assertion of that hostile title during the entire statutory period of 12 years without any let and hindrance and the plaintiff stood thereby.”

32. In the instant case the plaintiff, having been married prior to the amendment of Section 6 of the Hindu Succession Act 1956, she may not be a co-parcener. However, the properties being the self acquired properties of the testator, till his death, the right and title in the properties were vested in him. *De hors* the will, none of the children acquired any right over the properties till the demise of the testator. Therefore, during the life time of the testator, the right to sue did not accrue to the

plaintiff. Only from the date of death of her father, the right to sue accrued to the plaintiff. In this view of the matter, the finding of the lower Court that the suit is not barred by limitation is not liable for interference. This Point is accordingly held in favour of the plaintiff.

33. Re Point (iii): Sri M. Rajamalla Reddy, learned Counsel submitted that the sale deeds were not executed in favour of defendant No.3 by defendant No.1 or defendant Nos.8 to 10, his three sons. That the alleged agreements of sale were not produced before the Court and that the sale deeds executed in favour of defendant Nos.10 to 28 by defendant No.1 and defendant Nos.8 to 10 were hit by the doctrine of lis pendens.

34. Mr. N. Vijay, the learned Counsel, submitted that the suit was originally filed against defendant Nos.1 and 2 and that defendant Nos.8 to 10 have sold the property before they were impleaded. When the plaintiff's right to her share is recognised and relief by way of decree is granted by the court, she must be placed on equal footing as the other co-sharers such as defendant No.1. Whether the sales are hit by the doctrine of lis pendens or not, the plaintiff is entitled to 1/3rd of the plaint schedule properties towards her share. It is submitted by the learned Counsel for the plaintiff and the same is not denied that

item No.3 of the plaint schedule properties is the most valuable of all the properties and that therefore the Court below without assessing the value of the said item qua the remaining items of the suit schedule properties unjustly allotted the same to defendant Nos.1, 8, 9 and 10. We find merit in this submission. While on the one hand holding that the court has to work out equities based on the values of properties in the final decree proceedings, the lower court on the other hand is not justified in allotting item No.3 of the A-schedule property exclusively to the share of defendant Nos.1, 8, 9 and 10 so as to be eventually allotted to defendant Nos.10 to 28. Once the case set up by defendant Nos.1, 8, 9 and 10 based on the will is not accepted by the court, it necessarily follows that the plaintiff cannot be subjected to any disadvantage in the allotment of properties merely because defendant Nos.1, 8, 9 and 10 have chosen to assert their right under the will and sell the most valuable item of the property to others to the detriment of the plaintiff. In this view of the matter, the decree, to the extent of allotment of share of plaint A-Schedule property to defendant Nos.1, 8, 9 and 10 is liable to be set-aside and the Cross Objections deserve to be allowed.

35. In the result, the appeal is dismissed. The Cross Objections are allowed.

36. As a sequel to the dismissal of the appeal, interim order dated 18-4-2008 in A.S.M.P.No.646 of 2008 is vacated and ASMP No.646 of 2008, I.A.No.1 of 2012 (ASMP No.2218/2012) and I.A.No.1 of 2016 (ASMP No.323/2016) are disposed of as infructuous.

Justice C.V. Nagarjuna Reddy

Justice D.V.S.S. Somayajulu

Date : 10-08-2018

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