

THE HONOURABLE SRI JUSTICE M.LAXMAN

APPEAL SUIT No.361 of 2016

JUDGMENT:

1. The present appeal has been directed against judgment and decree dated 08.03.2016 in O.S.No.115 of 2008 on the file of Additional Senior Civil Judge, Karimnagar, wherein and whereby the suit filed by the plaintiffs for partition was allowed. Aggrieved by the same, the present appeal is filed at the instance of the defendants.

2. The appellants herein are defendant Nos.2 and 3, respondent Nos.1 to 3 herein are plaintiffs and respondent No.4 herein is defendant No.1 in the suit. For the sake of convenience, the parties hereinafter are referred to as they were arrayed in the suit.

3. The sum and substance of the case of the plaintiffs is that they are daughters, defendant No.1 is their mother and defendant Nos.2 and 3 are their brothers. The house bearing No.7-1-824 (Old No.7-1-661) constructed over land admeasuring Ac.0-03 guntas situated at Mankammathota, Karimnagar Town and District (hereinafter referred to as 'suit property') was originally purchased by their father K. Yellaiah. The said K. Yellaiah, who was working as driver in Road

Transport Corporation (RTC) expired on 24.12.2001 intestate leaving behind plaintiffs and defendants to succeed the suit property. After death of their father, plaintiffs demanded for partition, but the defendants did not come forward. Hence, the present suit.

4. Defendant No.1 was set *ex parte*. Defendant Nos.2 and 3 filed written statement pleading that they were doing private jobs and contributed amounts for construction of suit property. Further, their father obtained private loans from M. Bhoopal Reddy, P. Raji Reddy, Laxminarayana and others to a tune of Rs.10,00,000/- and defendants discharged such private loans. Further, plaintiff Nos.1 and 2 were given streedhana at the time of their marriages and the marriage of plaintiff No.3 was performed by the defendants after the death of their father by giving streedhana by obtaining amounts from various persons. Further, they also cleared house loan which was obtained for construction of suit property. They further pleaded that their father executed Will Deed dated 12.09.2001 in their favour recognizing contribution made for marriages of plaintiff Nos.1 and 2 and discharging of loan secured by the testator. Defendant No.1 was also present while executing the

said Will Deed. Defendant No.1 was given all the retirement benefits i.e., amount to an extent of Rs.5,61,298/-, pertaining to their father. In view of the above pleadings, defendant Nos.2 and 3 prayed to dismiss the suit.

5. On the basis of the above pleadings, the trial Court has framed the following issues for consideration:

- “1. Whether the suit schedule property is the joint family property of plaintiffs and defendants?
2. Whether the plaintiffs are entitled for partition and separate possession of 1/6th share each as prayed for?
3. To what relief?”

6. The plaintiffs in support of their case examined P.Ws.1 and 2 got marked Exs.A-1 to A-4. The defendants, to prove their case got examined D.Ws.1 to 3 and got marked Exs.B-1 to B-11.

7. The trial Court has not accepted the Will Deed and consequently, suit was decreed. Hence, the present appeal at the instance of defendant Nos.2 and 3.

8. Heard learned counsel for both sides and perused the material on record.

9. In light of the above submissions, the points emerge for consideration in the present appeal are as follows:

- “1. Whether the defendant Nos.2 and 3 proved the execution of Will Deed under Ex.B-1 beyond all suspicious circumstances surrounding its execution?
2. Whether the plaintiffs are entitled to their respective shares in the suit property?
3. To what relief?”

Point Nos.1 and 2:

10. There is no dispute that the suit property was purchased by late Yellaiah, who is the father of the plaintiffs and defendant Nos.2 and 3 and husband of defendant No.1. The plaintiffs claim that construction of house was done by their father during his life time, but the contesting defendants (defendant Nos.2 and 3) claim that they have contributed money for construction of house. They also claimed that they cleared the private loans secured by their father and also incurred expenses for performing the marriages of plaintiff Nos.1 and 2, and in recognition of the same, their father executed the Will Deed.

11. In the above background, if the Will Deed set up by the defendants is to be accepted, the plaintiffs' suit must be dismissed; otherwise, interference of this Court with the

findings of the trial Court is unwarranted. Therefore, this Court has to see whether the defendants proved execution of Ex.B-1 Will Deed and removed all suspicious circumstances.

12. The law governing the proof of execution of Will Deed is clearly enunciated by the Apex Court in **Raj Kumari v. Surinder Pal Sharma**¹ and the relevant portion reads as under:

“12. We would first expound the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act. Clause (c) of Section 63 of the Indian Succession Act 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 airman so employed (2013) 7 SCC 490 or engaged, or a mariner at sea, shall execute his will according to the following rules—

(a)-(b) * * *

(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 acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.” As per the mandate of clause (c), a Will is required to be attested by two or more witnesses each of whom should have seen the testator sign or put his mark on the Will or should have seen some other person sign the Will in his presence and by the direction of the testator or should have received from the testator a **personal acknowledgment of his signature or mark, or of the signature of such other person**. The Will must be signed by the witness in the presence

¹ Civil Appeal No.9683/2009, dated 17.12.2019

of the testator, but it is not necessary that more than one witness should be present at the same time. No particular form of attestation is necessary. Thus, there is no prescription in the statute that the testator must necessarily sign the Will in the presence of the attesting witnesses only or that the attesting witnesses must put their signatures on the Will simultaneously, that is, at the same time, in the presence of each other and the testator.

13. The need and necessity for stringent requirements of clause (c) to Section 63 of the Indian Succession Act has been elucidated and explained in several decisions. In H. Venkatachala Iyengar v. B.N. Thimmajamma and Others (1959 AIR 443), dilating on the statutory and mandatory requisites for validating the execution of the Will, this Court had highlighted the dissimilarities between the Will which is a testamentary instrument vis-à-vis other documents of conveyancing, by emphasising that the Will is produced before the court after the testator who has departed from the world, cannot say that the Will is his own or it is not the same. This factum introduces an element of solemnity to the decision on the question where the Will propounded is proved as the last Will or testament of the departed testator. Therefore, the propounder to succeed and prove the Will is required to prove by satisfactory evidence that (i) the Will was signed by the testator; (ii) the testator at the time was in a sound and disposing state of mind; (iii) the testator understood the nature and effect of the dispositions; and (iv) that the testator had put his signature on the document of his own free will. Ordinarily, when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of mind of the testator and his signature as required by law, courts would be justified in making a finding in favour of the propounder. Such evidence would discharge the onus on the propounder to prove the essential facts. At the same time, this Court observed that it is necessary to remove suspicious circumstances surrounding the execution of the Will and therefore no hard and fast or inflexible rules can be laid down for the appreciation of the evidence to this effect.

14. In Jaswant Kaur v. Amrit Kaur and Others (1977 AIR 74), it was held that suspicion generated by disinheritance is not removed by mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in sound and disposing state of mind when the Will

disinherits those like the wife and children of the testator who would have normally received their due share in the estate. At the same time, the testator may have his own reasons for excluding them. Therefore, it is obligatory for the propounder to remove all the legitimate suspicions before a Will is accepted as a valid last Will of the testator. **Earlier, in Surendra Pal and Others. v. Dr. (Mrs.) Saraswati Arora and Another** 4, this Court had observed that the propounder should demonstrate that the Will was signed by the testator and at the relevant time, the (1977) 1 SCC 369 (1974) 2 SCC 600 testator was in a sound and disposing state of mind and had understood the nature and effect of the dispositions, that he had put his signature on the testimony of his own free will and at least two witnesses have attested the Will in his presence. However, suspicion may arise where the signature is doubtful or when the testator is of feeble mind or is overawed by powerful minds interested in getting his property or where the disposition appears to be unnatural, improbable and unfair or where there are other reasons to doubt the testator's free will and mind. The nature and quality of proof must commensurate with such essentiality so as to remove any suspicion which a reasonable or prudent man may, in the prevailing circumstances, entertain. Where coercion and fraud are alleged by an objector, the onus is on him to prove the same and on his failure, probate of the Will must necessarily be granted when it is established that the testator had full testamentary capacity and had in fact executed the Will with a free will and mind. In Rabindra Nath Mukherjee and Another v. Panchanan Banerjee (Dead) by LRs. and Others ((1995) 4 SCC 459), this Court had observed that the doubt would be less significant if the Will is registered and the Sub-Registrar certifies that the same was read over to the executor who, on doing so, had admitted the contents. In each case, the court must be satisfied as to the mandate and requirements of clause (c) to Section 63 of the Indian Succession Act.

15. In Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs. (Special Leave Petition (C) Nos.36311-12/2014), this Court referring to Section 63 of the Indian Succession Act had illustrated that the provisions contemplate that in order to validly execute the Will, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the

testator or signature of the person signing for him has to be so placed that it was intended to give effect to the writing as a Will. Section 63 mandates that the Will should be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other person sign it in the presence and on 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 has signed the Will in the presence of the testator, though it is not necessary that more than one witness be present at the same time and that no particular form of attestation is necessary. The execution and attestation of the Will are mandatory in nature and any failure and deficiency in adhering to the essential requirements would result in invalidation of the instrument of disposition of the property.”

13. It is also apt to refer to Section 3 of the Transfer of Property Act which defines the word “attested” and it reads as under:

“3. Interpretation clause:- In this Act, unless there is something repugnant in the subject or context:-

xxx

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

14. From the above decision and the provision of law, it is clear that the propounder to succeed and prove the Will is

required to prove by satisfactory evidence that (i) the Will was signed by the testator; (ii) the testator at the time was in a sound and disposing state of mind; (iii) the testator understood the nature and effect of the dispositions; and (iv) that the testator had put his signature on the document of his own free will. Apart from the above, the testator has to remove all the suspicious circumstances surrounding the execution of the Will which are unnatural, improbable and unfair and demonstrate lack of free will and mind on the part of the testator.

15. The word 'to attest' means to bear witness to a fact in order to validate the attestation. The essential conditions are (i) there must be two attesting witnesses, (ii) each of them must have seen the executant sign or affix his mark to the instrument, (iii) each of the two attesting witnesses must have signed the instrument in the presence of the executants and (iv) the witness had an animus to attest.

16. From a reading of Section 3 of the Transfer of Property Act, for a valid attestation, it is essential that there must be two or more witnesses have seen the executants sign or affix

his mark to the instrument or has received from him a personal acknowledgment of his signature or mark, if the witness was not present at the time of execution.

17. In the present case, to prove the Will, the defendants have examined D.W.3, who is the attester and scribe of the document. The evidence of D.W.3 shows that he was called by testator and he was asked to write a Will Deed. As per the instructions of the testator, he wrote the Will Deed under Ex.B-1 and explained the contents of the Will to the executant, and after the signature of the executants, he and Srinivas signed the document.

18. The trial Court has held that there is no proper proof of execution of Will Deed on the ground that there is no evidence to show that other witness i.e., Srinivas received personal acknowledgment of contents of the Will from the testator. This finding of the trial Court is not in tune with the requirement of proof of execution and role of the attester. The requirement of attester obtaining acknowledgment of the contents of Will Deed is not required. What is required is that the testator sign in the presence of two or more witnesses; and if any one of the

witnesses was not present at the time of execution, they must obtain the acknowledgment of execution from the testator.

19. In the present case, the evidence of D.W.3 shows that after the commencement of execution of scribing of Will Deed, the other attesting witness viz., Srinivas arrived to the house of testator. This was taken note by the trial Court to hold that the other attesting witness was not aware of the contents of the Will Deed which is not at all required. The evidence of D.W.3 also clearly shows that at the time of execution, Srinivas was present along with him. This is sufficient enough to hold that there was a valid attestation. Hence, the findings of the trial Court in this regard require to be set aside.

20. Now the question is whether the defendants have removed all the suspicious circumstances. The grave circumstances are denial of share to the unmarried daughter and wife of the testator and place of purchase of stamp paper of Ex.B-1.

21. Learned counsel for the appellants/defendant Nos.2 and 3 relied upon the decision of the Hon'ble Supreme Court in **Ramabai Padmakar Patil (Dead) through LRs. v.**

Rukminibai Vishnu Vekhande², whereunder it has been held

as under:

“8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder if the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be suspicious circumstance especially in a case where the request has been made in favour of an offspring. [In PPK Gopalan Nambiar v. PPK Balakrishnan Manbiar and Ors.](#), AIR (1995) SC 1852 it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed. [In Pushpavati and Ors. v. Chandrara Kadanba and Ors.](#), AIR (1972) SC 2492, it has been held that if the propounder succeeds in removing the suspicious circumstance, the Court would have to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. [In Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee](#) (dead) by Lbs. and Ors., [1950] 4 SCC 459, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession in and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed.

² (2003) 8 SCC 537

22. The evidence on record shows that defendant No.1 was provided with death benefits and nothing was provided to the unmarried daughter (plaintiff No.3) in the Will Deed. However, the contents of the Will Deed show that the defendants have to perform the marriage of plaintiff No.3.

23. No doubt, when the property itself is bequeathed in favour of other natural siblings, denial of allocation of property to any of the natural siblings is not a suspicious circumstance. Further, an obligation is created on the beneficiaries to perform the marriage of plaintiff No.3. Thus, this circumstance does not invalidate the Will Deed.

24. The other suspicious circumstance is with regard to purchase of stamp paper for execution of Ex.B-1 Will Deed. Ex.B-1 was purchased in Vemulawada on 12.09.2001. The execution of the document, according to the defendants, was done on the same day at about 1.00 pm or 2.00 pm. The evidence of D.W.1 shows that on the date of execution of Ex.B-1, the testator was althrough present in the house only and the document was purchased in the name of the testator only.

25. Further, the testator was suffering with kidney failure and he was on dialysis from 1995 onwards. He died in the month of December, 2001. That means, hardly after three months of executing Ex.B-1 he died. When he was feeble and unable to move on account of dialysis, it is not known how he could purchase the stamp paper in his name by travelling to Vemulawada. Further, when the stamp vendors are available in Karimnagar, there was no need for the testator to go to Vemulawada for purchasing the stamp paper.

26. The evidence also shows that D.W.2 was the Constable, who is the beneficiary, and he worked for some time in Vemulawada. It is not the case of the defendants that the document was purchased by the third party in the name of the testator. The document itself shows that it was purchased by the testator. Therefore, this suspicious circumstance is not removed.

27. Further, the evidence on record shows that both the beneficiaries were present at the time of execution of Will Deed. They were actively participated in the execution process. However, there are some contradictions in the

evidence of D.Ws.1 and 3. According to D.W.3, the testator asked him to go to his house for execution of Will Deed, whereas the evidence of D.W.1 shows that the testator personally went to the house of D.W.3 to secure him. This is also somewhat creating a doubt.

28. Further, defendant Nos.2 and 3 claimed that defendant No.1 was also present at the time of executing the Will Deed. But, defendant No.1 who was examined as P.W.2 in her evidence clearly deposed that there was no execution of Will Deed by the testator, as claimed by defendant Nos.2 and 3. This is also creating doubt to believe the claim set up by defendant Nos.2 and 3.

29. These are all circumstances which are surrounding the execution of the document and the said suspicious circumstances were not removed. This was rightly taken note by the trial Court in holding that the case of the defendants for claim of property on the basis of Will Deed is not maintainable. Hence, such findings require no interference. Once the defendants failed to establish the Will Deed, naturally the claim of the plaintiffs for share in the suit property cannot be

denied, which was rightly allowed by the trial Court. The trial Court rightly decreed the suit and no interference is required with such findings. Accordingly, these points are decided.

Point No.3:

30. In the result, the appeal suit is dismissed, confirming the judgment and decree dated 08.03.2016 in O.S.No.115 of 2008 on the file of Additional Senior Civil Judge, Karimnagar. There shall be no order as to costs. Miscellaneous petitions pending, if any, shall stand closed.

Date: 04.01.2023
TJMR

M.LAXMAN, J