M.B. Ramesh (D) By Lrs vs K.M. Veeraje Urs (D) By Lrs. & Ors on 3 May, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2088, 2013 AIR SCW 2732, 2013 (3) AJR 301, 2013 (2) AIR KANT HCR 840, (2013) 3 ALLMR 962 (SC), (2013) 4 CIVLJ 762, (2013) 2 CLR 14 (SC), (2013) 3 JCR 179 (SC), (2013) 127 ALLINDCAS 155 (SC), (2014) 2 GUJ LR 970, (2013) 4 CURCC 240, 2013 (127) ALLINDCAS 155, 2013 (6) SCALE 534, 2013 (3) ALLMR 962, 2013 (2) CLR 14, 2013 (7) SCC 490, AIR 2013 SC (CIVIL) 1441, 2013 (2) KER LT 107 SN, (2013) 3 ICC 685, (2013) 2 WLC(SC)CVL 38, (2013) 2 HINDULR 257, (2013) 120 REVDEC 438, (2014) 3 CAL HN 5, (2013) 5 KANT LJ 160, (2013) 2 KER LJ 797, (2013) 3 MAD LW 764, (2013) 4 ANDHLD 104, (2013) 2 RECCIVR 932, (2013) 6 SCALE 534, (2013) 4 MPHT 239, (2013) 4 KCCR 2945, (2013) 99 ALL LR 487, (2013) 2 ALL RENTCAS 247, (2013) 4 ALL WC 4027, (2013) 3 BOM CR 893

Bench: Ranjana Prakash Desai, H.L. Gokhale

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1071 OF 2006

M.B. Ramesh (D) By LRS. …Appellants

Versus

K.M. Veeraje Urs (D) By LRS. & Ors. …Respondents

J U D G E M E N T

H.L. Gokhale J.

This Civil Appeal raises the question as to whether the will of one Smt. Nagammanni was validly executed, and whether the same was duly proved by the respondent no.1 and another (original plaintiffs). There is one more connected issue raised in this appeal as to whether a learned Judge of the High Court of Karnataka was right in interfering in Second Appeal, into the concurrent findings of the Trial Court and the Lower

Appellate Court in exercise of High Court's powers under Section 100 of Code of Civil Procedure.

Facts leading to this Civil Appeal are as follows:-

2. The respondent no.1 and another, the original plaintiffs are the sons of a cousin of one Smt. Nagammanni who died on 21.11.1970. It is claimed by them that she left behind a will executed way back on 24.10.1943, and registered with the Sub-Registrar at Mysore, on 25.10.1943. The original plaintiffs claimed that through the said will she has bequeathed her property in their favour. The property referred in the will is her ancestral property. The property of late Smt. Nagammanni consisted of 11 parcels of dry land situated in village Mallinathpuram, and 2 parcels of wet land situated in village Kaggalli, both in taluk Mallavalli in district Mandya, State of Karnatka. Out of these 11 parcels of dry land those at Sl. Nos.2, 5 and 10 (from the list referred in the plaint) were not covered in the will.

3. It was the case of the original plaintiffs that they were in possession of these parcels of land, and their possession was sought to be disturbed by the appellant herein (original defendant no.1 and others). Smt. Nagammanni is the widow of one C. Basavaraje Urs, whereas the appellant is the son of this C. Basavaraje Urs from his second wife. After the death of Smt. Nagammanni, the plaintiffs, as well as the defendants, applied for entering their names in the revenue records as the owners of the concerned lands. The Mutation Registrar however passed an order on 29.3.1971, in favour of the defendants. The plaintiffs preferred an appeal against the same to the Assistant Commissioner Mandya. However, when they found that taking advantage of the said order the defendant No 1 was trying to disturb their possession over the suit properties, they were required to file a suit, on the basis of the will, which they filed in the Court of Principal Civil Judge at Mandya, and which was numbered as Suit No.32 of 1975. They prayed for a declaration of their title to the suit property, and for a permanent injunction restraining the defendants from interfering with their possession thereof. Alternatively, they prayed that in case it is held that they were not in possession, a decree be granted for recovery of possession of the property with future mesne profits.

4. The suit was contested by the defendants, the appellant herein, by contending that Smt. Nagammanni was not the owner of the suit property, and in any case the will relied upon by the respondents was not a valid one. It was additionally submitted that the relations of Smt. Nagammanni and the appellant were cordial, and the claimed will must have been revoked, which revocation was being suppressed by the respondents.

5. The learned trial judge raised in all ten issues. The first out of these issues was whether the plaintiffs proved that the suit property rightly belonged to Smt. Nagammanni, and the learned Judge answered it in the affirmative. This finding has not been disturbed by the fist appellate court, nor seriously contested in the present Civil Appeal also. It is the second issue framed by the trial judge which is the crucial one, namely, whether the plaintiffs prove that Smt. Nagammanni executed a registered will dated 24.10.1943 in favour of the plaintiffs, and bequeathed the suit properties to them.

6. The plaintiff no.1 (PW-1) examined himself in support of his case. He examined three more witnesses in support, out of whom the second witness P. Basavaraje Urs (PW-2) is the most relevant one. The defendants examined three witnesses though nothing much turns on their evidence.

Documentary evidence was also produced by both the parties, which has been considered by the courts below. The respondent no.1/plaintiff identified the signatures made by
Smt. Nagammanni at two different places on the will (exhibit P-3). Those signatures were marked as P-3 (a) and P-3(d). While cross-examining him, the appellant produced two inland letters written by Smt. Nagammanni to claim that their relations had become cordial, but it must also be noted that therein she had claimed her maintenance amount from the appellant. The respondent no.1 identified the signatures of Smt. Nagammanni on those two letters, and they were marked as Exhibits D4 and D5. Theses signatures were clearly comparable with her signatures on the will. This was accepted by the learned trial judge by observing that "on a comparison of the signatures I find there is some force in this contention. The signatures tally". This finding of the trial judge is neither disturbed by the first appellate court nor by the High Court.

7. The next witness on behalf of the respondent no.1/plaintiff was one P. Basavaraje Urs (PW-2). He was working as a Patel (Village Officer) at village Mallinathpuram, in district Mandya, at the relevant time. He is an attesting witness to the will. He produced land revenue receipts containing his signatures, which were marked as Exhibits P7 to P14 and P19. He proved his own signature on the will by comparing it with his signatures on these Exhibits P7 to P14 and P19. He stated in his cross-examination that, apart from him, two other persons were attesting witnesses, namely, M. Mallaraje Urs and Sampat Iyanger. However, by the time his evidence was being recorded in November 1978, both of them had passed away. He stated that he could identify the hand writing and signature of M. Mallaraje Urs. The signature of M. Mallaraje Urs on the will was marked as Exhibit P3 (h). He also identified the signatures of Smt. Nagammanni on the will i.e. P3 (a) and P3 (d). He stated that she signed the will in his presence and he also signed the same in her presence. This part of the evidence of PW1 and PW-2 has remained undisturbed. Thus, it can be safely said that Smt. Nagammanni has executed the will (Exhibit P3) which also bears the signatures of PW-2 P. Basavaraje Urs, and one M. Mallaraje Urs.

8. The appellants tried to dispute the validity of the will by drawing attention of the Court to various circumstances. They disputed the presence of P. Basavaraje Urs at the time of signing of the will by asking him questions as to when did he come down to Mysore on that day from Mallinathpuram, and what did he do on that date. The learned trial judge, as well as the judge of the first appellate court, has been impressed by some of the discrepancies in this behalf appearing in his statement, and which were highlighted by the appellant. The fact, however, remains that PW-2 was giving his deposition some 35 years subsequent to the execution of the will, and therefore not much credence can be given to such discrepancies in his evidence. It was also submitted on behalf of the appellant that it was not clear as to how and when the will was discovered by the respondents/plaintiffs herein. Further, much emphasis was laid on the fact that when the will was made by Smt. Nagammanni, she was just about 40 years of age, and still described herself in the will as old and infirm. It was also contended that it was surprising that though the will was made some 35 years ago, the respondents/plaintiffs did not know anything about it until the death of Smt. Nagammanni. As far as the writing of the will is concerned, certain doubts were raised by pointing out that the writing

was not so very continuous, and the signatures thereon appeared to have been adjusted. The evidence of PW-2 was also sought to be assailed by contending that he was an interested witness. It was pointed out, for that purpose, that in an earlier suit, arising out of a mortgage of a property of Smt. Nagammanni, he had feigned ignorance about the place where the will was written or the persons who were present at that time.

9. As far as this objection is concerned, it must be stated and cannot be denied that in the earlier suit, PW2 had very much deposed that he was an attesting witness to the will. Similarly, about Smt. Nagammani describing herself as an old person, it must be noted that what she had stated was that she was getting old. Such a statement by a person will always depend upon the perception of the person concerned about the condition of his or her health. It appears that, in view of her strained relations with her husband, she wanted her property to be protected, and wanted to make a provision that it should devolve on her relatives. It is another matter that she lived long, thereafter. Similarly, there is no substance in the plea of the defendant No 1 that his relations with Smt. Nagammani had become cordial and she must have revoked the will. If that was so, he would have surely produced such a document of revocation. Similarly, no issue can be made out of the production and reliance on the will, some 35 years subsequent to its execution. There is no dispute about Smt. Nagammani's signature on the will, and her wishes are clear. It is only when the properties bequeathed under the will had to be protected, that the will was required to be produced and relied upon. A will is required to be acted upon, only after the testator passes away, and in the instant case immediately when the occasion arose, the will was produced and relied upon. In the circumstances, we do not find much force in any of these objections.

10. As against these discrepancies in the evidence of PW-2, it was emphasized on behalf of the respondent no.1/plaintiff that C. Basavaraje Urs, the husband of Smt. Nagammanni had earlier filed a suit against her, claiming these very properties as his own properties and that suit came to be dismissed, which finding was confirmed in appeal. It was also pointed out that the appellant was the son of C. Basavaraje Urs from his second wife, and was required to pay maintenance to Smt. Nagammanni, as required by a Court order. It was also submitted by the plaintiffs that the will was a document which was more than 30 years old, and under Section 90 of Evidence Act, the Court is expected to presume that the signature in every part of the document is in the hand writing of the person concerned, and that the document was duly executed.

11. The trial court accepted the submissions on behalf of the appellant herein, and held that the plaintiffs had failed to prove the will since it had not come in the evidence of PW-2 that Smt. Nagammanni had executed the will in the presence of the second witness M. Mallaraje Urs, or that this M. Mallaraje Urs had also signed the will in her presence. Thus, the requirement of Section 63 (c) of the Indian Succession Act, 1925 ('Succession Act' for short) was not fulfilled viz. that two or more witnesses have to see the testator sign or affix his mark to the will, and each of the witnesses have also to sign the will in the presence of the testator. The Court, therefore, decided issue no.2 against the plaintiffs and dismissed the suit. The first appellate Court also took the same view in Regular Appeal No. 30 of 1989, and dismissed the appeal filed by the respondents herein.

12. The respondent/plaintiff thereafter filed a second appeal bearing R.S.A No. 546 of 1996, wherein, a learned Single Judge of the High Court framed the question of law in the following words:-

> "Whether the concurrent findings of the Appellate Court that the plaintiff have not proved the will is bad in law and the finding in that regard is perverse and contrary to the evidence on record?"

The learned Single Judge decided the said question of law in favour of the respondents-original plaintiffs by his impugned judgment and order dated 23.1.2004, which has led to the present appeal by special leave. When the special leave petition came up for consideration on 11.10.2004, this court issued notice and directed that the status-quo as then obtaining be maintained. Leave to appeal was granted thereafter on 6.2.2006. We may note that an attempt was made to settle the dispute by referring it to mediation, but that has not succeeded.

Consideration of the submissions of the rival parties:

13. The first submission on behalf of the appellant has been that the learned judge of the high Court has erred by framing the question of law, in the manner in which he has. It was submitted that when the trial court and the first appellate court have given a concurrent finding about the invalidity of the will, it was a finding of fact, and the High Court could not have disturbed the finding of fact by framing a question of law as to whether the finding was bad in law, and perverse or contrary to the evidence on record. Reliance was placed, in this behalf, on the observations of this Court in Narayanan Rajendran Vs. Lekshmy Sarojini reported in 2009 (5) SCC 264. That apart, it was submitted that in any case, the findings of the Courts below could not in any way be categorized as perverse, since they were not contrary to the evidence on record.

14. We may, however, note in this behalf that as held by a Constitution bench of this Court in Chunilal Mehta Vs. Century Spinning and Manufacturing Company reported in AIR 1962 SC 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. That apart, as held by a bench of three judges in Santosh Hazari Vs. Purushottam Tiwari reported in 2001 (3) SCC 179, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the will of Smt. Nagammanni and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in Union of India Vs. Ibrahim Uddin reported in 2012 (8) SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

> "67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse."

15. At the same time we cannot accept the submission on behalf of the respondents as well that merely because the will was more than 30 years old, a presumption under Section 90 of the Indian Evidence Act, 1872 ('Evidence Act' for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been

executed and attested. As held by this Court in Bharpur Singh Vs. Shamsher Singh reported in 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63 (c) of the Succession Act read with Section 68 of the Evidence Act.

16. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be executed in the manner required by S 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam reported in 2003 (2) SCC 91 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available. The relevant provisions of these three sections read as follows:

"Section 63 of the Succession Act

"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 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 acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Evidence Act

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an

attesting witness alive, and subject to the process of the Court and capable of giving evidence..."

Section 71 of the Evidence Act

"71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

17. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW-2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as per Section 63 (c) of the Succession Act. PW-2 has stated that he has signed the will in the presence of Smt. Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt. Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt. Nagammanni. Section 63 (c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a bench of three judges of this Court (per Gajendragadkar J, as he then was) way back in
R. Venkatachala Iyengar Vs. B N. Thimmajamma reported in AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.

18. The propositions laid down in Venkatachala Iyengar (supra) have been followed and explained in another judgment of a bench of three Judges in Smt. Jaswant Kaur Vs. Smt Amrit Kaur, reported in AIR 1977 SC 74, wherein the law has been crystallized by Y.V. Chandrachud J (as he then was), into the following propositions:-

"10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v. B.N. Thirnmajamma and Ors. [1959] Su. 1 S.C.R. 426. The Court, speaking through Gajendragadkar J., laid down in that case the following propositions :-

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very

> circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

19. In Janki Narayan Bhoir (supra), this Court has explained the inter-relation between Section 63 (c) of the Succession Act, 1925 and Section 68 and 71 of the Evidence Act, 1872. In that matter only one attesting witness to the will was examined to prove the will, but he had not stated in his deposition that the other attesting witness had attested the will in his presence. The other attesting witness, though alive and available, was not examined. The Court noted the relevant facts in para 5 of the judgment (as reported in SCC) as follows:-

> "Prabhakar Sinkar, the attesting witness, in his deposition stated that he did not know whether the other attesting witness Ramkrishna Wagle was present in the house of the respondent at the time of execution of the will. He also stated that he did not remember as to whether himself and Raikar were present when he put his signature. He did not see the witness Wagle at that time; he did not identify the person who had put the thumb impression on the will. The scribe Raikar in his evidence stated that he wrote the will and he also stated that he signed on the will deed as a scribe. He further stated that the attesting witnesses, namely, Wagle and Prabhakar Sinkar are alive."

On this background, the Court held at the end of the para 6 of the judgment that "it is true that although a will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Section 68 of the Indian Evidence Act", but it also noted in paragraph 9 that "that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory." In paragraphs 11 and 12 of the judgment, the Court noted the relevance of Section 71 of the Evidence Act by stating that "aid of Section 71 can be taken only when the attesting witnesses who have been called, deny or fail to recollect the execution of the document to prove it by other evidence." "Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined." In the facts of the case, therefore, the Court held that attestation of the will as required by Section 63 of the Succession Act was not established which was equally necessary.

20. In the present case, we may note that in para 21 of his cross examination, P. Basavaraje Urs has in terms stated, "Mr. Mallaraje Urs and Smt. Nagammanni, myself and one Sampat Iyanger were present while writing the will." One Mr. Narayanmurti was also present. In para 22 he has stated that Narayanmurti had written Exhibit 3 (will) in his own handwriting continuously. The fact that M.Mallaraje Urs was present at the time of execution of the will is not contested by the defendants by putting it to PW2 that M. Mallaraje Urs was not present when the will was executed. As held by a Division Bench of the Calcutta High Court in a matter concerning a will, in para 10 of A.E.G. Carapiet Vs. A.Y. Derderian

reported in [AIR 1961 Calcutta 359],….”Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice”. As noted earlier the will was executed on 24.10.1943 in the office of the advocate Shri Subha Rao situated at Mysore, and was registered on the very next day at Mysore. The fact that the will is signed by Smt. Nagammanni in the presence of PW2 on 24.10.1943 has been proved, that PW2 signed in her presence has also been proved. Can the signing of the will by Smt. Nagammanni in the presence of M. Mallaraje Urs and his signing in her presence as well not be inferred from the above facts on record? In our view, in the facts of the present case, the omission on the part of PW2 to specifically state that the signature of M. Mallaraje Urs on the will (which he identified) was placed in the presence of Smt. Nagammani, and that her signature (which he identified) was also placed in the presence of M. Mallaraje Urs, can be said to be a facet of not recollecting about the same. This deficiency can be taken care of by looking to the other evidence of attendant circumstances placed on record, which is permissible under Section 71 of the Evidence Act.

21. The issue of validity of the will in the present case will have to be considered in the context of these facts. It is true that in the case at hand, there is no specific statement by PW2 that he had seen the other attesting witness sign the will in the presence of the testator, but he has stated that the other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the Cross examination that the other witness (Mr. Mallaraje Urs), Smt. Nagammani, himself and one Sampat Iyanger and the writer of the will were all present while writing the will on 24.10.1943 which was registered on the very next day. This statement by implication and inference will have to be held as proving the required attestation by the other witness. This statement alongwith the attendant circumstances placed on record would certainly constitute proving of the will by other evidence as permitted by Section 71 of the Evidence Act.

22. While drawing the appropriate inference in a matter like this, a Court cannot disregard the evidence on the attendant circumstances brought on record. In this context, we may profitably refer to the observations of a Division Bench of the Assam High Court in Mahalaxmi Bank Limited Vs. Kamkhyalal Goenka reported in [AIR 1958 Assam 56], which was a case concerning the claim of the appellant bank for certain amounts based on the execution of a mortgage deed. The execution thereof was being disputed by the respondents, amongst other pleas, by contending that the same was by a purdahnashin lady, and the same was not done in the presence of witnesses. Though the evidence of the plaintiff was not so categorical, looking to the totality of the evidence on record, the Court held that the execution of the mortgage had been duly proved. While arriving at that inference, the Division Bench observed:-

> “11……It was, therefore, incumbent on the plaintiff to prove its execution and attestation according to law. It must be conceded that the witnesses required to prove attestation has (sic) not categorically stated that he and the other attesting witnesses put their signatures (after having seen the execution of the document) in the presence of the executants. Nevertheless, the fact that they

actually did so can be easily gathered from the circumstances disclosed in the evidence. It appears that the execution and registration of the document all took place at about the same time in the house of the defendants. The witnesses not only saw the executants put their signatures on the document, but that they also saw the document being explained to the lady by the husband as also by the registering officer.

They also saw the executants admit receipt of the consideration, which was paid in their presence. As all this happened at the same time, it can be legitimately inferred that the witnesses also put their signatures in the presence of the executants after having seen them signing the instrument……

……There is no suggestion here that the execution and attestation was not done at the same sitting. In fact, the definite evidence here is that the execution and registration took place at the same time. It is, therefore, almost certain that the witnesses must have signed the document in the presence of the executants…….”

23. The approach to be adopted in matters concerning wills has been elucidated in a decision on a first appeal by a Division Bench of Bombay High Court in Vishnu Ramkrishana Vs. Nathu Vithal reported in [AIR 1949 Bombay 266]. In that matter, the respondent Nathu was the beneficiary of the will. The appellant filed a suit claiming possession of the property which was bequeathed in favour of Nathu, by the testatrix Gangabai. The suit was defended on the basis of the will, and it came to be dismissed, as the will was held to be duly proved. In appeal it was submitted that the dismissal of the suit was erroneous, because the will was not proved to have been executed in the manner in which it is required to be, under Section 63 of Indian Succession Act. The High Court was of the view that if at all there was any deficiency, it was because of not examining more than one witness, though it was not convinced that the testatrix Gangabai had not executed the will. The Court remanded the matter for additional evidence under its powers under Order 41 Rule 27 CPC. The observations of Chagla C.J., sitting in the Division Bench with Gajendragadkar J. (as he then was in Bombay High Court) in paragraph 15 of the judgment are relevant for our purpose:-

“15…… We are dealing with the case of a will and we must approach the problem as a Court of Conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of Conscience would not permit such a thing to happen. We have not heard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent – and grossly negligent in not complying with the requirements of S.63 and proving the will as they ought to have should not deter us from calling for

the necessary evidence in order to satisfy ourselves whether the will was duly executed or not……..”

(emphasis supplied)

24. As stated by this Court also in R. Venkatachala Iyengar and Smt. Jaswant Kaur (both supra), while arriving at the finding as to whether the will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court’s role in matters concerning the wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in paragraph 77 of Gurdev Kaur Vs. Kaki reported in 2006 (1) SCC 546]. In the present matter, there is no dispute about these factors. The issue raised in the present matter was with respect to the due execution of the will, and what we find is that the same was decided by the trial Court, as well as by the first appellate Court on the basis of an erroneous interpretation of the evidence on record regarding the circumstances attendant to the execution of the will. The property mentioned in the will is admittedly ancestral property of Smt. Nagammanni. She had to face a litigation, initiated by her husband, to retain her title and possession over this property. Besides, she could get the amounts for her maintenance from her husband only after a court battle, and thereafter also she had to enter into a correspondence with the appellant to get those amounts from time to time. The appellant is her stepson whereas the respondents are sons of her cousin. She would definitely desire that her ancestral property protected by her in a litigation with her husband does not go to a stepson, but would rather go to the relatives on her side. We cannot ignore this context while examining the validity of the will.

25. In view of the above factual and legal position, we do hold that the plaintiffs/respondents had proved that Smt. Nagammanni had duly executed a will on 24.10.1943 in favour of the plaintiffs, and bequeathed the suit properties to them. She got the will registered on the very next day. The finding of the Trial Court as well as the First Appellate Court on issue no.2 was clearly erroneous. The learned Judge of the High Court was right in holding that the findings of the Trial and Appellate Court, though concurrent, were bad in law and perverse and contrary to the evidence on record. The second appeal was, therefore, rightly allowed by him. Accordingly, we dismiss the present civil appeal. The Suit No.32 of 1975 filed by the respondents in the Court of Principal Civil Judge at Mandya in Karnataka will stand decreed. They are hereby granted a declaration of their title to the suit property, and for a permanent injunction restraining the defendants from interfering with their possession thereof. In case their possession has been in any way disturbed, they will be entitled to recover the possession of the concerned property, with future mesne profits. In the facts of the present case, however, we do not order any costs.

……..……..J.

[H.L. Gokhale]

……..J.
[Ranjana Prakash Desai]

New Delhi
Dated : May 03, 2013
