

**Puttegowda Vs. Thimmajamma and Others**

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**Court :** Karnataka

**Decided On :** Feb-04-1998

**Reported in :** ILR1998KAR1730; 1998(3)KarLJ405

**Judge :** M.B. Vishwanath, J.

**Acts :** [Indian Succession Act, 1925](#) - Sections 63; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

**Appeal No. :** Regular Second Appeal No. 229 of 1992

**Appellant :** Puttegowda

**Respondent :** Thimmajamma and Others

**Advocate for Def. :** Sri R.S. Ravi, Adv.

**Advocate for Pet/Ap. :** Sri T.N. Raghupathy, Adv.

**Judgement :**

1. The appellant-plaintiff has filed the present second appeal under Section 100 of the CPC challenging the judgment and decree dated 14-11-1991 passed in R.A. No. 49 of 1990 by the Civil Judge, Hunsur, dismissing the appeal filed by the plaintiff and confirming the judgment and decree dated 23-6-1990 passed by the Munsiff, K.R. Nagar, in O.S. No. 137 of 1983.

2. The appellant-plaintiff filed the suit for partition and separate possession of the suit properties. Plaintiff Puttegowda (present appellant), second defendant Ramegowda (present respondent 2), third defendant Chikkegowda (present respondent 3) and 9 daughters of whom fourth defendant Kamma is one of the daughters are the children of one Chikkegowda who died on 23-3-1981. On 11-11-1965 the present appellant-plaintiff executed a registered release deed Ex. D-1 after taking his share. Third defendant Chikkegowda also executed the release deed Ex. D-2 after taking his share. Father Chikkegowda had a share in the suit properties. He executed a registered Will Ex. D-6 dated 23-4-1980 bequeathing his share (suit properties) in favour of the third defendant.

3. In Paragraph 4 of the plaint, the appellant-plaintiff has adverted to the Will and has contended that his father was not in a sound and disposing state of mind when he executed the Will and has claimed 1/3 share in the suit properties.

4. The contesting respondent 3 has stated that his father Chikkegowda was in a sound and disposing state of mind and executed the registered Will Ex. D-6 bequeathing his property in his (third defendant) favour. Hence the plaintiff is not entitled to any share.

5. Both the Courts below have held that the Will Ex. D-6 was proved according to law and the plaintiff was not entitled to any share in the suit properties. Consequently the suit filed by the plaintiff has been dismissed.

6. Both the Courts below have relied on the evidence of the attesting witness D.W. 3 and the scribe D.W. 2 in coming to the conclusion that the Will was proved according to law.

7. The substantial question of law framed by this Court relates to the validity or otherwise of the Will.

8. The learned Counsel for the appellant-plaintiff took me through the evidence of the scribe and the attesting witness to impress upon this Court that the Will was not proved in accordance with Section 63 of the Indian Succession Act.

9. As against this the learned Counsel for the contesting respondent also took me through the evidence and submitted that the Will was proved in accordance with law and the provisions of Section 63 had been complied with.

10. The learned Counsel for the appellant relied on the decision of this Court in Sanjiua @ Sanjiva Bhandary v Vasantha. This was a case in which the Will did not see the light of the day for nearly 20 years. The party who challenged the validity of the Will did not challenge the Will in his reply notice. This authority has no application to the facts of the present second appeal.

11. In Pushpavati and Others v Chandraraja Kadamba and Others, the Supreme Court has laid down the requirements for the proof of execution of a Will and that the burden of proof is on the propounder of the Will, especially when it is alleged to be a forged Will. In the instant case it is not the case of the plaintiff that the Will is forged. The plaintiff has stated in the plaint that Chikkegowda, who executed the Will Ex. D-6, was not in a sound and disposing state of mind. The law laid down by the Supreme Court has been again made clear in Surendra Pal and Others v Dr. (Mrs.) Saraswati Arora and Another.

12. The plaintiff, having challenged the Will, cannot majestically sit and watch the performance of the propounder of the Will and the Court. The Supreme Court has been pleased to hold in Surendra Pal's case, supra, that where the person who challenges the Will alleges undue influence, fraud and coercion, the onus is on him to prove the allegations. It is for the person challenging the Will, when once the propounder discharges the burden, to prove the circumstance which invalidate the Will.

13. In the instant case, the plaintiff has not even entered the box to swear that the Will is not genuine.

14. It is argued by the learned Counsel for the appellant-plaintiff that the extent retained by Chikkegowda is different from the extent mentioned in the Will and submitted that the properties which had not fallen to the share of the testator has been bequeathed. In the properties which have not fallen to the share of Chikkegowda, his son (appellant-plaintiff) may be granted a share since the suit is

for partition. So went the argument.

15. The points urged by the learned Counsel for the appellant-plaintiff have not been mentioned in the plaint. If this Court starts meeting this argument and other arguments advanced by the learned Counsel for the appellant-plaintiff, this Court will be back to square one. The Supreme Court has been pleased to lay down in *Ramachandra Ayyar v Ramalingam Chettiar*, that the High Court will not be justified in interfering with the finding of fact recorded by the lower appellate Court.

16. The conclusions reached by the Courts below are findings on fact based on appreciation of evidence. The finding on the validity of the Will is neither perverse nor illegal. The plaintiff has indulged in luxury litigation. He has not even cared to get himself examined.

17. For the aforesaid reasons the present second appeal is dismissed.

The appellant shall pay the costs of contesting respondent 2 (second defendant) and bear his own.

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