

Krishnabai Vs. Maheshwar

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Court : Karnataka

Decided On : Dec-10-1998

Reported in : ILR1999KAR1038; 1999(6)KarLJ357

Judge : H. Rangavittalachar, J.

Acts : [Indian Succession Act, 1925](#) - Sections 45, 47, 59, 63, 67, 276, 278 and 283; [Evidence Act, 1872](#) - Sections 68 and 102

Appeal No. : Miscellaneous First Appeal No. 2445 of 1996

Appellant : Krishnabai

Respondent : Maheshwar

Advocate for Def. : Sri V.P. Mallya, Adv.

Advocate for Pet/Ap. : Sri K.I. Bhatta, Adv., for ;Sri Ravi G. Sabhahit

Judgement :

1. Appellant-plaintiff had filed an application under Section 276 read with 283 of the Indian Succession Act for probating the Will of her deceased mother, late Mahalakshmi Chintamani. This application on being contested by the respondent, was registered and tried as a suit and dismissed; which judgment is being challenged in this appeal.

2. Briefly stated the facts of this case are:

One Chintamani and his wife Mahalakshmi adopted Maheshwar-respondent as their son and Krishnabai the appellant herein is their natural daughter who is unmarried and remaining as such till now. Chintamani died in the year 1956, and Mahalakshmi, the testatrix hereinafter referred to as such executed a Will on 23-2-1980 and had it registered under which she has bequeathed her one third share in the family property in favour of only the appellant while disinheriting the respondent. The testatrix died on 7-7-1992. Appellant sought for probating her Will. The respondent entered caveat and denied the Will of having been executed by the testatrix besides contended that it was a 'concocted and fabricated' one. Because of the contest it was tried and enquired as a suit.

3. Before the learned Judge appellant examined herself as P.W. 1 and examined the attesor of the Will as P.W. 2. She also produced the original Will as Exhibit P. 1 and death certificate as Exhibit P. 2. Respondent examined himself as D.W. 1 besides producing certified copies of the plaint, vakalath, deposition filed by testatrix and deposition of appellant vide Exhibits D. 1 to D. 4. Learned Judge has dismissed the suit on the following grounds.-

1. That there are suspicious circumstances in the manner of executing the Will inasmuch as, in a partition suit filed by the testatrix against the respondent during the year 1986, (six years after the alleged execution of the Will) the testatrix had affixed her L.T.M. to the suit papers Exhibits D. 2 and D. 3 while the plaintiff had not furnished any satisfactory explanation as to how the testatrix affixed her signature to the Will.

2. The Will was attested not by relatives but by the colleagues at work of the propounder.

3. That the Will was not produced by the propounder in the suit O.S. No. 52 of 1986; and no satisfactory explanation is forthcoming for its non-production.

4. Since the testatrix was aged 70 years at the time of executing the Will, the plaintiff has not proved that she was in sound disposition of mind. Since the plaintiff failed to remove the suspicious circumstances, the suit must fail.

4. Before this Court Sri K.I. Bhatta, learned Counsel appearing for the appellant while assailing the impugned order submitted that none of the reasons stated by the Judge are sustainable having regard to the evidence of the case.

5. Secondly, he submitted that having regard to the close relationship of the testatrix to the plaintiff i.e., being her natural daughter and her status being unmarried who admittedly looked after her mother when the adopted son was staying away and having regard to the difference of opinion between them, there is nothing unnatural about bequeathing her share in favour of her daughter in preference to the son.

6. Lastly, he submitted that when the contesting respondent had not challenged the execution of the Will as executed under fraud, coercion except a bare denial of execution, the propounder had only to prove due execution of the Will in the manner known to law, which has been done in this case.

7. Per contra the learned Counsel Sri V.P. Mallya appearing for the respondent defended the order of the Court below and cited the following decisions in support of his contention:

1. Gurdial Kaur and Others v Kartar Kaur and Others;

2. Baliram Atmaram Kelapure v Smt. Indirabai and Others ;

3. Satya Pal Gopal Das v Smt. Panchubala Dasi and Others .

8. It is well known that the burden is upon the propounder to prove the Will. Since through the Will the testatrix or testator speaks after his/her death and prescribes a rule of succession of his/her estate, it is considered, as a solemn document, the Courts normally insists on a stricter method of proving and if there are present any circumstances that excite the suspicion of the Court, it calls upon the propounder to remove such suspicion before it is acted upon. So far as proof of the Will is considered the propounder has to prove the ingredients of Section 59 of the Succession Act and also prove it in accordance with Sections 67 and 68 of the Evidence Act i.e, 'the propounder has to prove that the Will was executed by the testatrix in a sound condition of mind and attested'.

9. In the leading case *H. Venkatachala Iyengar v B.N. Tkimma-jamma*, the Supreme Court has stated the manner and nature of proof required to prove a Will and the solemnity attached to the same which is as follows:

'What is the true legal position in the matter of proof of Wills? It is well known that the proof of Wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of Law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression 'a person of sound mind' in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained'? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It

would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to 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 the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated'.

10. Thus the principle that is evolved by the Supreme Court in short is that 'where circumstances exist which excite suspicion of the Court, the propounder has to remove such suspicion and prove affirmatively that the testator knew and approved the contents of the documents'. But what are suspicious circumstances is difficult to illustrate exhaustively. It depends upon facts of each case. Broadly stated some of the prominent ones indicated by the Court in the said decision being 'signature is doubtful, condition of the mind is very feeble and debilitated, the disposition made in the Will is very unnatural, unfair, improbable in the light of relevant circumstances'. In a later decision in *Smt. Indu Bala and Others v*

Manindra Chandra Bose and Another, the principles of Venkataehala's case, supra, has been reiterated and some of suspicious circumstances has been illustrated in a little more detail viz., 'The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the disposition made in the Will being unnatural, improbable or unfair, in the light of relevant circumstances'. The Court has however sounded a word of caution by stating 'Needless to say that any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal as is not normally expected in a normal situation or is not expected of a normal person'. Again in PPK Gopalan Nambiar v PPK Balakrishnan Nambiar and Others, it has been stated in order that the circumstances can be stated to be suspicious which should be removed by the propounder of the Will, it has stated 'It is trite, that it is the duty of the propounder of the Will to prove the Will add remove all suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind'.

(emphasis supplied)

Thus what emerges from a reading of Section 59 of Indian Succession Act. Sections 67 and 68 of the Evidence Act; and the decisions referred to above is: That when a Will is sought to be probated by the propounder, and is charged or attacked by the caveator, the initial burden is on the propounder of the Will first to prove the Will by establishing that the executor or executrix as the case may be was not a minor, was of sound mind knew the contents and signed the Will in the presence and at least by two witnesses, and at least one of the attesting witness has to be examined as provided under Section 68 of the Evidence Act, and then remove from the mind of Court every circumstance of legitimate suspicion which is found to exist; but the suspicious circumstances must be real, germane to the case, but the approach to the question cannot be in the often quoted passage by the Supreme Court of Lord-da-pareq in Harmes v Hinksan:

'Where a Will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion a resolute and impenetrable incredulity.

He is never required to close his mind to truth'.

One other important factor that has also to be kept in mind is that Courts should also guard in not over emphasizing circumstances which may look suspicious (though on a closer look it may not be red) which may result in frustrating the 'intention of the testator'.

After the propounder removes the legitimate suspicion circumstances if any then the burden shifts on the person attacking the Will on any grounds viz., fraud, undue influence, coercion, mistake etc., which burden he has to discharge by proper plea and proof.

11. Reverting to the facts of the case, the Will that is sought to be probated is Exhibit P. 1 produced from the custody of the appellant-propounded of the Will. The Will is typed in Kannada. The signature of the testatrix is as per at Exhibit P. 1(a) and P. 1(b). It is stated in the Will that 'the testatrix being aged 70 years getting weaker and out of her own Will is executing, the appellant herein being unmarried living and looking after her. That her adopted son that is respondent herein without her knowledge has sold certain family properties and without spending any part of the income to the care of either for the family or for her, and on account of difference of opinion between herself and adopted son, she is bequeathing her share in the family property in favour of the appellant'. One of the attester of the Will one Arvind has been examined by the appellant as P.W. 2 whose evidence is to the following effect:

'I knew Smt. Mahalaxmibai Chintamani who is now dead. On 23-2-1980, she had called me to her house. Accordingly, I went there. One Ramakant, Kumuda and Narendra accompanied us to the house of Advocate. Smt. Mahalaxmibai placed all the papers before the Advocate and told the Advocate that a Will has to be prepared. She expressed that she wanted to bequeath the suit properties in favour of the plaintiff. Accordingly, a Will was got typed by the said Advocate. It took about half an hour to complete the typing. The said Advocate read over the contents of the Will to us. Smt. Mahalaxmibai told that the contents are correct. Smt. Mahalaxmibai signed the said Will. Then all the four of us had attested the Will. Then all of us went to Sub-Registrar's Office. At the Sub-Registrar's Office,

Smt. Mahalaxmibai admitted execution of the Will before the Sub-Registrar. As per the instructions of the Sub-Registrar, Smt. Mahalaxmibai filed the registration fees. The Will was registered..... Now I see Ex. P. 1 and say that Ex. P. 1(a) to (d) are the signatures of the testatrix. Now I see my signature on Ex. P. 1 and say that I had signed Ex. P. 1 in the house of Advocate. The signature is now marked as Ex. P. 1(e).

Smt. Mahalaxmibai was physically and mentally in sound condition at the relevant time'.

12. Nothing has been elicited in the cross-examination to discredit this evidence or improbabilise as to what was stated therein. So also the respondent in his evidence has not been able to disprove the same. Hence, it has to be held that the testatrix was in sound mind understood the contents of the Will signed it in the presence of the attesting witnesses and is also attested by P.W. 2. In my opinion therefore the pro-pounder has proved the Will in accordance with law.

13. Coming to the suspicious circumstance, stated by the learned Judge viz., that respondent-adopted son has been disinherited while the appellant is preferred by the mother i.e., testatrix's share is concerned. The evidence discloses that the parties are Hindus, and the family of Chintamani consisted of himself, his wife Mahalakshmi the testatrix, Maheswar, the adopted son that is respondent herein and Krishnabai, the natural daughter-appellant. That the said Chintamani died on [7-7-1992] leaving behind the adopted son, unmarried daughter and his wife Mahalakshmi. That the daughter legatee under the Will is unmarried lived with her mother till her death and also looked after her during her old age. That the adopted son was working as a teacher and lived at Halaga away from the adoptive mother. That Krishnabai flat as stated in the Will that the son had sold certain family properties without her consent.

14. That the adopted son had inherited the property of the adoptive father as Class I heir and also his share as coparcener i.e., it is not as if the adoptive son has been deprived of his share of the family property. That the share of Krishnabai inherited as Class I heir of her husband is alone sought to be bequeathed. In having regard to the above circumstances and the further fact the mother has

choosen her natural daughter in preference to adoptive son; as it is natural to human nature to be more affectionate to the natural born children than towards a stranger introduced into the family by adoption. The circumstances stated above removes the suspicious circumstances if they be called for disinheriting the respondent from a fraction of a share of the family in preference to natural daughter.

Coming to the doubt expressed by the learned Judge regarding the ability of testatrix to sign the plea and evidence on this point is as follows:

15. In answer to the plea of the appellant that the testatrix executed the Will, except denying the execution and taking a defence that the Will was concocted, it is not the case of respondent that the testatrix was an illiterate woman who did not know how to write or sign.

16. Appellant who has been examined as P.W. 1 in this case has stated that the testatrix was a literate woman and in order to prove the said fact she has cited the instance where her mother under her signature had presented an application to the Village Officer Bada-11 marked as Exhibits P. 4, P. 5 and P. 6 besides the testatrix used to sign the papers in respect of cases before the Land Tribunal attended by her. Nothing is elicited in the cross-examination to discredit this statement.

17. However the respondent in his deposition has stated that the testatrix was only affixing L.T.M. Marks and not signature. He wants the said statement to be believed on the basis of a certified copy of the plaint in O.S. No. 52 of 1986 Exhibit D. 2 and the vakalath in that regard Exhibit D. 3 wherein the former had affixed her L.T.M. This part of the evidence seems to have influenced the learned Judge. But what the learned Judge has overlooked is, that the appellant was never confronted with the said document when she gave evidence at an earlier point of time to have her say. Besides Exhibits D. 1 and D. 2 were only certified copies and the alleged plaint and vakalath in original containing the L.T.M. of the testatrix was not before the Court for appreciating the same. Similarly, another circumstance overlooked by the learned Judge is that the Will is executed on 23-2-1980 and the alleged plaint and vakalath is executed on 21-7-1986 i.e., when the testatrix was about 76

years, the appellant in her deposition in the partition suit which has been produced in these proceedings has stated that 'since her mother i.e., testatrix on account of her old age was unable to see, move about, she was deposing on her behalf'. Perhaps due to this infirmity the testatrix must have affixed her L.T.M. in Exhibits D. 2 and D. 3. Hence, no significance can be attached to the same. One other factor to hold that no significance could be attached to Exhibits D. 1 and D. 2 is that the Will is registered under the provision of Registration Act. It is well known that the procedure for registration involves that the executant to admit execution before the Registering Authority apart from following the other legal formalities.

18. The next circumstance relied upon by the learned Judge is that the Will was not produced in the partition suit and no reason is forthcoming for the belated application for probate. The Will takes into effect only after the death of testator. Admittedly, the testatrix died on 7-7-1992 and the application for probate was filed on 9-10-1993. Insofar as the non-production of the Will in the partition suit is concerned, the partition suit was filed in 1986 by the testatrix and the appellant against the respondent; trial commenced on 4-3-1992 and the suit was decreed on 1-3-1994. Thus during the pendency of the said suit, this application for probate is filed. If the appellant had waited till the disposal of the suit and thereafter had filed this application such conduct could have been looked with some amount of suspicion, per contra when during the pendency of the suit this probate petition is filed and the respondent is put on notice of the alleged Will. Besides even if she had produced the Will in the said suit, having regard to the dispute raised by the latter regarding the Will, no use full purpose would have been served and under such circumstances, what the appellant has done is the right course so that the dispute regarding the Will would be resolved in these proceedings and the same could be acted upon in the partition suit. Therefore the non-filing of the Will in the partition suit cannot be a circumstance which can arouse any suspicion in the mind of the Court.

19. Coming to the last circumstance mentioned by the learned Judge viz., that the attesting witnesses were colleagues of appellant and were non-relatives of the testatrix. In the first place from the evidence it is clear that it is not at the appellant's instance the Will was prepared nor she had any role to play in the

preparation of the Will. Per contra the evidence discloses that the Will was prepared by an Advocate under instructions of the testatrix. Besides it has also to be stated that, that there is no legal impediment for the appellant's colleagues to be the attester. One other reason for me to hold the attester being the colleagues of propounder is of no significance is that the Will was registered as stated above and as the Supreme Court has held in : AIR 1995 SC1684 viz., 'In case where a Will is registered and the Sub-Registrar certifies that the same has been read over to the executor who on doing so admitted the contents, the fact that the witnesses are interested lose significance'. Therefore, the stated circumstances as suspicious even held as 'they are' the above stated facts removes the said suspicious circumstances.

20. Coming now to the authorities cited by the learned Counsel appearing for the respondent in support of his case is concerned the first case cited by the learned Counsel is Gurdial Kaur's case, supra, it has been held by the Supreme Court that 'The conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under the [Indian Succession Act, 1925](#) but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance'.

21. Similarly, in Baliram Atmaram Kelapure's case, supra, it has been held that 'Where the Will is propounded to alter the normal rule of succession, the burden lies upon the person putting up the Will to establish its truth and validity'.

22. In Satya Pal Gopal Das case, supra, it has been held that 'where the testator four years after execution and registration of Will yet he took no steps to have the Will cancelled or revoke it such a circumstance dispels any suspicious circumstance that may be attached to the Will'.

23. There cannot be any dispute regarding the proposition of law laid down by the Supreme Court as I have already stated that the burden is always upon the propounder to dispel any circumstance that may arise in the facts of the given

case which excite the suspicion of the Court besides proving the Will in the manner known to law. The ruling cited by the learned Counsel being only general propositions of law there cannot be any quarrel or dispute. In fact I have discussed the case only in the light of the rulings cited by the learned Counsel and come to the conclusion as I have stated above.

24. Coming now to the contention of the respondent namely that the Will is concocted and fabricated document, no reliance can be placed on the same, if it is well known that if after the propounder of the Will dispels the burden placed on him to prove the Will and also remove any suspicious circumstance that may exist the burden shifts on the party who alleges any fraud, coercion etc. Hence the burden is on the respondent to prove that the Will is a fabricated and a concocted one. It has to be stated that no particulars have been stated in the objection statement regarding what exactly the respondent meant by stating that the Will is fabricated or concocted. In other words, the pleadings in this behalf is lacking in particulars. Coming to the evidence in support of his case, respondent has examined himself as D.W. 1. Except stating that 'his mother did not execute the Will and she was not putting any signature to any document but only affixing the L.T.M. mark, the attesor wasstranger to the testatrix's community'; nothing has been stated regarding how the Will was concocted or fabricated. No other witness has been examined on this behalf. Therefore, in my opinion the respondent hopelessly has failed to establish his case.

25. For the reasons stated above, the judgment and order passed by the learned District Judge, Karwar, U.K. passed in O.S. No. 28 of 1995/P and SC No. 3 of 1993 is set aside and the appeal is allowed.