IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 307 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Nos.1,3 to 5 No.
No. 2 Yes.

BAI JAMNA DEVJI

Versus

HEIRS OF BAI JAKHU- VALLABHBHAI D TANDEL

Appearance:

MR SC SHAH FOR MR SN SHELAT for Appellants.
MR BS TRIVEDI for Respondents No.1 to 1/3, 2 (Absent)
RESPONDENT NOS.1/4 & 1/5 SERVED.

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 31/03/98

ORAL JUDGEMENT

This is defendants Second Appeal.

Facts giving rise to this appeal are shortly as

under :

Deceased Sukkar Govan was the exclusive owner and in possession of the property bearing old Gram Panchayat No.75 corresponding to new number 335. The deceased was the father's sister's son of plaintiff no.1. Plaintiff No.1 is the daughter of deceased Sukkar Govan from the second wife and the defendant no.2 is the husband of the defendant no.1. A will was executed by Sukkar Govan on 5.7.1937 which was cancelled by subsequent will of 22.4.1945. Thirdly, a will dated 12.9.1994 was executed cancelling the will of 1945 by Sukar Govan on 14.8.1958. It is a registered will. Sukar Govan died in 1960 The plaintiff alleged that during the life time of her father she was staying with him and looking after him. On the strength of the will dated 14.8.1958 two executors Naran Dhanji and Vallabh Dhanji were appointed. After the death of Sukar Govan the property was managed by plaintiff no.1. The plaintiff no.2 is the son of the plaintiff no.1. The defendant no.1 filed Suit No.31 of 1968 in the Court of Civil Judge (J.D),Pardi against the plaintiff no.1 which was dismissed. Thereafter, with the help of the police the defendant no.1 forcibly trespassed over the property of the plaintiff no.1. Criminal complaints were filed by two sides which were subsequently compromised. On the basis of the impugned will the plaintiff claimed to be the owner of the property no.335 and also prayed for possession of the property from the defendants.

The defendant no.1 contested the suit on the ground that it was barred by limitation and that in the absence of probate and letters of administration the suit is not maintainable. In the absence of the executors of the will the suit was said to be not maintainable. The impugned will is said to be illegal and not bonafide. It was alleged that the testator was not in sound disposing mind to execute will and his physical condition was also not such that he could execute the will and he was not knowing about the good and bad thing or about what he was doing. This defendant pleaded that she was staying with the deceased and has got right to remain in possession of the property in dispute as owner. The allegation of trespass to the disputed property which is the subject matter of the will was denied.

The defendant no.2, husband of defendant no.1 has filed a written statement adopting written statement of defendant no.1.

The suit was dismissed by the Trial Court and

Appeal was preferred by the plaintiff which was allowed and the suit was decreed. It is, therefore, this Second Appeal by the defendants.

Learned Counsel for the Appellant was heard. None appeared from the side of the defendants at the time of final hearing of this Appeal.

Learned Counsel for the Appellant contended that propounder of the will has to establish not only the execution of the will but also its attestation. He further contended that if there are suspicious circumstances arising from the will or arising from the circumstances of the case it is for the propounder to remove the suspicion to the satisfaction of the Court. If this is done then onus laid upon propounder is discharged. If however, the Caveator alleges undue influence, fraud and forgery onus shifts upon the caveator and if the caveator fails to establish these allegations the genuineness of the will has to be accepted. According to him, it is a case of non concurrent finding. His contention was that the Appellate Court has committed an error of law in upholding the validity of the will.

Following substantial question of law was formulated in this Appeal :

[1] Whether in the facts and circumstances of the case the lower Appellate Court was justified in up holding the will in the face of suspicious circumstances and the will being not natural in that the daugher was totally excluded from receiving any property of the deceased.

This substantial question of law covers the contention raised by the learned Counsel for the Appellant.

Only question is therefore regarding validity of the last will of the testator.

In order to prove that a will executed by the testator is genuine the propounder has to establish first execution of the will. Execution of the will is not to be proved in a mechanical manner by examining the scribe of the will or attesting witnesses but it has also to be proved that a testator was having sound disposing mind at the time of execution of the will. He understood the nature of the transaction and the nature of the document

which he was executing and if he was old, illiterate and physically or mentally infirm person then protection available to pardahnashin lady should have been made available to him. This protection is that the will should have been readover to the testator who should have been explained the nature of transaction, and only after understanding the nature and scope of transaction if the testator gave his signature or thumb impression on the will its execution could be said to have been proved. For proving the execution of the will since the testator was dead the scribe or the attesting witnesses should also have been examined for verifying and identifying the signature or thumb impression of the testator.

Not only execution but attestation of the will is also required to be proved by the propounder. By attestation, it is meant that the propounder has to produce attesting witnesses who should depose that the testator had signed the will in their presence and they had also signed the will in presence of the testator and other attesting witnesses and unless the execution as well as attestation of the will is proved, it cannot be read in evidence.

Even after the proof of due execution and attestation of the will onus of the propounder is not completely discharged. If the caveator alleges certain suspicious circumstances then those suspicious circumstances are required to be explained by the propounder to the satisfaction of the Court and the Court should feel satisfied that the alleged suspicious circumstances are not real suspicious circumstances going to the root or to the validity or to the genuineness of the will. If the propounder discharges such onus then normally the genuineness of execution and attestation of the will can be said to have been proved. However, if the otherside alleges forgery, undue influence, coercion or fraud while obtaining the will, then onus of proving these facts lies upon the otherside viz. caveator. If caveator succeeds in establishing these allegations the will has to be ignored. If however, the caveator fails to establish his allegation, the will is bound to be accepted as genuine. What has been stated above can be deduced from the verdict of the Apex Court in the case of Surendra Pal and others Vs. Dr.(Mrs.) Saraswati Arora and another, AIR 1974 SC 1999. It was a case of special leave to appeal against the order granting probate, where the above proposition of law was laid down by the Apex Court. This case followed the earlier verdict of the Apex Court reported in AIR 1959 SC 443, H.Venkatachala Iyengar Vs. B.N.Thimmajamma, AIR 1962 SC 567, Rania

Purnima Devi Vs. Khagendra Narayan Deb and also Privy Council in the case of Motibai Hormusjee Vs. Jamsetjee Hormusjee reported in AIR 1924 P.C.28.

On the point of suspicious circumstances the Supreme Court in case of Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and others, reported in AIR 1968 Pg.1332 observed that if the propounder takes prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner. Some of the suspicious circumstances were enumerated by the Apex Court in Pushpavati and others Vs. Chandraja Kadamba, reported in AIR 1972 SC Pg.2492. Some of those illustrations are that the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the deposition made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. It was also emphasised in this case that if propounder succeeds in removing suspicious circumstances the Court would have to give effect to the will even if the will might be unnatural in the sense it has cut off wholly or in part near relations. The case of Shashikumar Vs. Subodh Kumar, AIR 1964 SC Pg529 was also referred on the point.

Coming to the proof of execution of the will section 68 of the Evidence Act has to be kept in mind that if document is required by law to be attested, it shall not be used as evidence until one attesting witness 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.

There can be no dispute that will is a document which under law is required to be attested. Thus, for proving execution not only the scribe has to be examined but also atleast one attesting witness out of two provided such witness alive and is capable of giving evidence.

Section 63(c) of the Succession Act provides as under :

"The will shall be attested by two or more witnesses, each of whom has been 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."

This section therefore provides in what manner attestation is to be proved.

The Trial Court found that the execution and the attestation of the will was not proved in accordance with law. Reasoning was that the scribe of the will who was Clerk of an Advocate and main Architect of the will was not examined. Only one attesting witness was examined and in face of contradictions in his statement the Trial Court found him to be untrustworthy. In this way the execution and attestation was not found to be proved. The lower Appellate Court however, did not agree with the Trial Court and ignoring the contradictions found that the execution as well as attestation was proved. Scope of interference of the finding of fact in Second Appeal is very much limited. However, nonconcurrent finding is not always liable to interference in Second Appeal. However, the fact remains that the material evidence viz. scribe who was Architect of the will was not examined. There are contradictions interse in the statement of the only attesting witness examined by propounder. Propounder herself did not enter the witness box though she was present at all material time. The plaintiff no.2 is her son who was appointed as executor of the will. There is no cogent reason why the propounder viz. plaintiff no.1 had not entered the witness box. There is nothing on record to show that she is a pardahnashin lady. Likewise there is nothing on record to show that any attempt was made to get her examined on commission. As such adverse inference can be drawn that if she would have entered the witness box she would not have supported her case or that she was unwilling to enter the witness box with a view to avoid giving false statement. The plaintiff no.2 is no doubt the Son of the plaintiff no.1 but he being a formal plaintiff and only executor of the will cannot be said to be real plaintiff to prove the case set up in the plaint. Non-examination of the plaintiff no.1 is therefore a circumstance against the plaintiff no.1.

Scribe of the will was also present at the time of registration. Still the plaintiff no.1 did not examine him in the Court. Under these circumstances the view taken by the lower Appellate Court cannot be said to be sound. However, even without interfering with the finding of the lower Appellate Court on the point of execution or attestation of the will if it is accepted that the that the will was duly executed and properly attested as required under the aforesaid section referred to above there are suspicious circumstances and those suspicious circumstances should have been removed to the satisfaction of the Court. The lower Appellate Court observed that there is no suspicious circumstance which required explanation from the propounder. This view of the lower Appellate Court cannot be said to be correct.

There are several suspicious circumstances which have not been explained by the propounder. The first suspicious circumstance is that the propounder who is real and substantial beneficiary in the will and also main plaintiff did not enter the witness box. No reason has been assigned for this and this itself creates suspicion about the genuineness of the transaction.

Another suspicious circumstance is that under the disputed will only right to stay was granted to the plaintiff no.1. The lower Appellate Court declared the plaintiff no.1 to be the owner of the property till she is surviving. Normally in will such life estate is not granted. This itself is suspicious circumstance and it should have been explained. The next suspicious circumstance is that the near relation viz. the daughter of the deceased i.e. defendant no.1 was totally excluded from any interest in the property of the deceased and the deceased granted property under the will to his niece viz. to his father's sister's daughter. Exclusion of near relation by the deceased is also suspicious circumstance. The lower Appellate Court on the strength of recital in the will came to the conclusion that sufficient explanation was given thereunder why the daughter of the deceased viz. defendant no.1 was excluded. However, since there are other suspicious circumstances also this circumstance cannot be totally ignored if it is found that the will was not executed under free mind of the testators then exclusion of the near relation will be real suspicious circumstance.

Next suspicious circumstance is nonexamination of Ratilal, the scribe of the will and Clerk of the Advocate. He was material witness and he should have been examined.

Another suspicious circumstance is that there is indication from the evidence on record that the will was written three days before its execution and that too in the office of an Advocate by his Clerk who was scribe of the will. If testator was hale and hearty and was having sound disposing mind there was no reason why the execution was postponed for 3 days especially when the testator, the scribe and the attesting witnesses were present there. It was not a transaction where some money was to be arranged and for that purpose the execution of the will was postponed for 3 days. Postponment of the execution of the will creates another suspicious circumstance. It is not a case where only draft was prepared 3 days earlier. If the original will itself was ready before 3 days there was no occasion for postponing its execution for 3 days.

it is also in evidence that the testator was old and illiterate man. It is an admitted case from the two sides that the testator remained ill. The statement from the side of the defendant no.1 on ailament of the deceased testator was not believed but there is evidence from the side of the propounder plaintiff no.1 that the testator remained ill as well as bed ridden and doctors used to be called. If the testator was bedridden, ill and also old and infirm person he was entitled to the benefit usually available to pardahnashin lady. But there is nothing on record to satisfy the Court that the contents of the will were readover to the testator who understood the nature of transaction and willingly signed the same. If he would have understood nature of the transaction and he would have made beneficiary viz. his niece the absolute owner of the property and not that he would have been satisfied only by giving life estate to his niece.

Possibility that because earlier two wills were cancelled by the testator, it might have been it was thought to have last will of the choice of the beneficiary cannot be ruled out and this is also a suspicious circumstance.

It is in evidence that the testator was suffering from head trouble. Evidence from the side of the defendant no.1 is that the testator was sometimes of sound mind and sometimes of unsound mind and he used to behave indifferently and was incapable of knowing difference between good and bad. This goes to the root of sound disposing mind of the testator and this evidence was wrongly disbelieved by the lower Appellate Court.

When both the sides were in agreement that the testator was suffering from head trouble and was bed ridden possibility that the mind of the testator was affected due to ailment cannot be ruled out. This, therefore, further shows that there is suspicious circumstance that the testator was not of sound disposing mind and if this is so and if this suspicion was not removed to the satisfaction of the Court the will cannot be said to be genuine and believable.

Presence of the testator in the office of the Advocate where the will was prepared also seems to be doubtful in view of alleged ailment set-up by propounder and evidence that he was bedridden. If the testator was bedridden then he could not have easily gone to the office of the Sub-registrar. He was identified before the Sub-registrar by the scribe who was Architect of the will. Again scribe has not been examined. Endorsement of the Sub-registrar no doubt is entitled to weight and the presumption which is attached about the correctness of the endorsement of the Sub-registrar is not conclusive but rebuttable. This presumption could have been strengthned by examining scribe Ratilal who identified the testator before Sub-registrar. Nonexamination of Ratilal therefore rebuts the presumption of correctness of the endorsement of Sub-registrar. Sub-registrar could have no personal knowledge whether the person produced before him was the real testator Sukkar Govan or some impostor. As such, this is also suspicious circumstance which has not been explained by the propounder.

There could be no absolute inference that if the will is prepared in the office of an Advocate the same must be suspicious. But it can be said that if testator was unable to move and was bedridden the will which was prepared 3 days earlier in his absence in the office of the Advocate can safely be said to have been prepared under legal advice. Presence of the plaintiff no.1, propounder of the will at all material time who was real beneficiary is itself suspicious circumstance as was held by the Apex Court in the case reported in AIR 1968 SC Pg.1332 (Supra).

The disputed will was executed on 14.8.1958 whereas Sukkar Govan expired in the year 1960 i.e. within two years after the execution of the will. The plaintiff no.2 stated that the testator was bedridden for two years before his death and that he was treated by 3 Medical Officers but was not cured. He further stated that this was his last illness and Medical Officers were visiting the deceased at his residence. He further

admitted that when the testator expired he was very old. It was rightly disbelieved that the testator expired 7 or 8 years after the execution of the will. If on admission of plaintiff no.2 the testator was bedridden for two years before his death and the testator expired in 1960 whereas he executed the will in August,1958, the greater possibility is that he was not in sound disposing mind at the time of execution of the will nor he could have on account of his bedridden condition gone to the office of the Clerk or Advocate where the will was prepared or before the Sub-registrar at the time of registration.

Since the above suspicious circumstances have not been removed or explained to the satisfaction of the Court the genuineness of the will cannot be accepted simply because it is a registered document.

The defendant no.1 pleaded that the will is forged document. Even if the forgery could not be established by satisfactory evidence that is no ground for upholding genuineness of the will especially when the suspicious circumstances could not be explained by the propounder.

For the reasons given above and because the suspicious circumstances could not be removed and explained by the propounder the will in question cannot be held to be genuine, legal and valid document. The view taken by the lower Appellate Court is contrary to law and therefore seems to be erroneous hence judgment and decree of the lower Appellate Court for these reasons cannot be sustained. The result therefore is that the Appeal succeeds.

The Appeal is accordingly allowed with costs. The judgment and decree of the lower Appellate Court is set aside and the judgment and decree of the Trial Court dismissing the suit of the plaintiff is restored.

Sd/-
(D.C.Srivastava, J)

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m.m.bhatt