



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF FEBRUARY, 2024

BEFORE

THE HON'BLE MR JUSTICE ASHOK S.KINAGI

REGULAR SECOND APPEAL NO.222 OF 2013 (DEC)

BETWEEN:

1. S NAGARAJ DEAD BY LRS
SHIVAGANGAMMA
W/O LATE S. NAGARAJ
AGED ABOUT 49 YEARS
CHIKKAJAJURU VILLAGE
HOLALKERE TALUK
CHITRADURGA DISTRICT

2. SINDHU N,
D/O LATE S. NAGARAJ
AGED ABOUT 22 YEARS
R/AT CHIKKAJAJUR VILLAGE
HOLALKERE TALUK
CHITRADURGA DISTRICT - 23

3. PAVAN KUMAR N,
S/O LATE S. NAGARAJ
AGED ABOUT 20 YEARS
R/AT CHIKKAJAJUR VILLAGE
HOLALKERE TALUK,
CHITRADURGA DISTRICT - 23

...APPELLANTS

(BY SRI. R.S. RAVI, SR. COUNSEL A/W
SRI. PRATHEEP K C, ADVOCATE)

AND:

1. SMT. HALAMMA,
W/O LATE ANNAIAH,

Digitally
signed by R
DEEPA

Location:
HIGH COURT
OF
KARNATAKA



SINCE DEAD BY HIS LR'S

2. PARVATHAMMA,
W/O BASAVARAJA
AGED ABOUT 52 YEARS
R/O V BLOCK, KSRTC DEPOT ROAD,
CHURCH EXTENSION
CHITRADURGA DISTRICT- 23

...RESPONDENTS

(BY SRI. N.R. JAGADEESHWARA, ADVOCATE FOR R2
VIDE ORDER DATED 06.02.2014 R2 IS ALREADY ON
RECORD SINCE R1 IS DECEASED)

THIS RSA IS FILED U/S. 100 OF CPC AGAINST THE JUDGEMENT & DECREE DATED 20.10.2012 PASSED IN R.A.NO.29/2010 ON THE FILE OF PRINCIPAL DISTRICT AND SESSIONS JUDGE, CHITRADURGA, DISMISSING THE APPEAL PASSED AGAINST THE JUDGEMENT AND DECREE DTD 17.12.2009 PASSED IN OS.NO.86/2006 ON THE FILE OF II ADDITIONAL CIVIL JUDGE (SR.DN.), CHITRADURGA.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This second appeal is filed by the appellant challenging the judgment and decree dated 20.10.2012 passed in R.A.No.29/2010 by the Prl. District and Sessions Judge, Chitradurga, confirming the judgment and decree dated 17.12.2009 passed in O.S.No.86/2006 by the II Addl. Senior Civil Judge, Chitradurga.



2. For the sake of convenience, parties are referred to as per their ranking before the trial Court. The appellant is the plaintiff and respondents are the defendants. Plaintiffs filed a suit for declaration that the plaintiff is entitled to get 1/2th share in the suit schedule properties, partition and separate possession.

3. The brief facts leading rise to filing of this appeal are as under:

It is the case of the plaintiff, that item Nos.1 to 3 suit schedule properties are the joint family properties of plaintiff's father namely Sannaiah, who succeeded to the properties in a oral partition effected in family and out of the income derived from item Nos.1 to 3 suit schedule properties, item No.4 was acquired by the family in the name of defendant No.1. After the death of Sannaiah, his wife Halamma, plaintiff and defendant No.2 enjoying the suit schedule properties as a member of Hindu Undivided Family, plaintiff and defendants inherited and succeeded the suit schedule properties. The plaintiff began to manage



the entire affairs of the suit schedule properties and the revenue and municipal records pertaining to the suit schedule properties remained unchanged, as such the plaintiff and defendants are in peaceful possession without any interruption from anybody. It is contended that recently, the defendants colluding with each other and to cause a wrongful loss, on the basis of some created and manipulated documents, started asserting the rights over entire suit schedule properties. The plaintiff on verification came to know that in the year 1996 on the basis of the will alleged to have been executed by Sannaiah, defendant No.2 got mutated the revenue and municipal records in respect of item Nos.1 to 3 of suit schedule properties. It is contended that the alleged will is void and late Sannaiah, has no manner of right, title, possession or interest to execute a will in the coparceners properties and defendant No.2 has not acquired any right under the registered will over the item Nos.1 to 3 of the suit schedule properties. The plaintiff approached the defendants to effected partition, but the defendants refused to effect partition.



Hence, plaintiff filed suit for declaration, partition and separate possession.

4. The defendant denying the averments made in the plaint and it is contended that except admitting their relationship with plaintiff and in turn defendants have contended that plaintiff was given education upto PUC with great difficulties. The plaintiff secured the employment in the BTD Engineering college, Davangere as clerk and neglected his father Sannaiah and went away relinquishing all his rights over suit schedule properties. The plaintiff never looked after or taken care of his father Sannaiah, who died on 27.12.1998 at Chitradurga. The item No.1 of the suit schedule property originally belonged to one Govindamma d/o Hanumanthappa, since Govindamma died issueless, the property devolved in favour of her brothers namely Doddaiyah and Sannaiah. The Sannaiah got 1 acre 35 guntas of land towards Northern side and same is give in favour of defendant No.2-Parvathamma under the registered Will. Thus, suit item No.1 is not the



ancestral or joint family property. Suit item No.2 property came to Sannaiah under Darakath, which was bequeathed in favour of defendant No.2. So also, Sannaiah had purchased item No.3 out of his own earnings from Govindamma under registered sale dated 08.03.1985.

5. Defendant No.1 purchased suit item No.4 under the sale certificate dated 14.07.1988. The said item No.4 is the self acquired property of defendant No.1. The son-in-law of defendant No.1 was taken care of Sannaiah, out of love and affection Sannaiah bequeathed the suit item Nos.1 to 3 of suit schedule properties under a registered Will deed 16.02.1996 in favour of defendant No.2. Defendant No.2 became the absolute owner of item Nos.1 to 3 of the suit schedule properties and enjoying the same by paying land revenue to the authorities. Hence, prays to dismiss the suit.

6. The trial Court, on the basis of the above said pleadings, framed the following issues:



- 1) *"Whether the plaintiff proves that the suit schedule properties are the ancestral and joint family properties of himself and the defendant and they inherited and succeeded to the estate after the death of Sannaiah?"*
- 2) *"Whether the defendant prove that suit item No.1 to 3 properties were the self acquired properties of Sannaiah?"*
- 3) *"Whether defendant No.1 proves that suit item No.4 property is her self acquired property?"*
- 4) *"Whether defendant 2 proves that she becomes the lawful owner o suit item 1 to 3 properties by virtue of will executed by Sannaiah dated 16.02.1996?"*
- 5) *"Whether plaintiff proves his entitle for declaration and has share in the suit schedule property by metes and bounds?"*
- 6) *"What decree or order?"*

7. Plaintiff in order to prove his case, power of attorney holder of the plaintiff was examined as PW1 and examined one witness as PW2 and got marked 17 documents as Ex.P1 to P17. In rebuttal, defendant No.2 was examined as DW2 and examined 4 witnesses as DW1 and DW3 to DW5 and marked 12 documents as Ex.D1 to D12.

8. The trial Court after assessment of oral and documentary evidence of the parties, answered issue



Nos.1 and 5 in Negative, issue Nos.2 to 4 in Affirmative and issue No.6 as per the final order. The suit of the plaintiff was dismissed.

9. The plaintiff aggrieved by the judgment and decree passed by the trial Court preferred an appeal in R.A.No.29/2010 on the file of Prl. District and Sessions Judge, Chitradurga.

10. The First appellate Court, after hearing the parties, has framed the following points for consideration:

1. *"Is the learned trial judge right in holding that the appellant is the legally wedded wife of the plaintiff Nagaraj?"*
2. *"Whether the findings of the learned trial judge that the plaintiff has not been able to prove that the schedule properties are the ancestral and joint family property are correct?"*
3. *"Whether the findings of the learned trial judge that item Nos. 1 to 3 of the schedule were the self acquired properties of Sannaiah and that item No.4 is the self acquired property of the 1st defendant are correct?"*
4. *"Whether the findings of the learned trial judge that the 2nd defendant had been able to prove the will executed in her favour by her father are correct?"*



11. The First appellate Court, on re-assessment of oral and documentary evidence, answered points Nos.1 to 4 in the Affirmative and dismissed the appeal with costs.

12. The plaintiff aggrieved by the judgments and decrees passed by the Courts below has filed the second appeal.

13. Heard Sri R.S. Ravi, learned Senior counsel for Sri Pratheep K.C., learned counsel the plaintiff and also learned counsel for the defendants.

14. Learned Senior counsel for the plaintiff submits that the Courts below have committed an error in passing the impugned judgments. He submits that the defendants have failed to prove the execution of alleged will and further the Courts below placing reliance on the other will the trial Court dismissed the suit of the plaintiff.

15. He further submits that DW4 has identified the signature of the testator and he do not know who gave instructions for drafting the Will and he do not remember



who were all came to the office of sub registrar and he further submits that DW.4 has not examined the names reflecting in page No.183.

16. He also submits that the sub registrar officer was not examined in order to prove the registration of the Will and further mental conditions of the testator was not explained. He submits that the defendants have not examined the attesting witnesses to the registered Will and he also submits that the Will is surrounded by suspicious circumstances and in order to buttress his argument he has placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Bharpur Singh and Others vs Shamsher Singh*** reported in ***AIR (2009) SC 1766***. Hence, on these grounds he prays to allow the appeal.

17. *Per contra*, learned counsel for the defendants submits that defendant No.2 has proved the Will and further submits that in order to prove contents of the deed defendant No.2 was examined as DW2 and also typist



who, has typed the Will as DW5. He also submits that the attesting witnesses are no more. Hence, examined the scribe and also typist. He stated that the judgment and decree passed by the First appellate Court is just and proper and does not call for any interference. Hence, prays for dismiss the appeal.

18. This Court admitted the appeal on 29.01.2020 to consider the appeal for following substantial question of law:

"Whether the courts below were justified in dismissing the suit for partition at the instance of defendant No.2, who claimed to have succeeded to the suit property by a Will – (Ex.D.3) without he examining the attesting witness as provided under Section 63 of the Indian Succession Act and under Section 68 of the Indian Evidence Act?"

19. Heard and perused the records and considered the submissions of the learned counsel for the parties.

20. **Substantial question of Law:** Plaintiff in order prove his case examined his power of attorney holder as PW1 and he has deposed that item Nos.1 to 3 of the suit



schedule properties are the ancestral properties of the joint family properties of plaintiff's father namely Sannaiah, who succeeded to the properties in the oral partition effected in the family and out of the income derived from suit item Nos.1 to 3 properties, item No.4 was acquired by the family in the name of defendant No.1. After the death of Sannaiah, the plaintiffs and defendants are in joint possession and enjoyment of the suit schedule properties and further they are the members of Hindu undivided family.

21. It is also contended that the Sannaiah has no right to execute the Will in respect of item Nos.1 to 3 of suit schedule properties in favour of defendant No.2 and defendant No.2 has not acquired any right over the item Nos.1 to 3 by virtue of Will alleged to have been executed by Sannaiah in favour of defendant No.2.

22. Further the plaintiff in order to prove that the suit schedule properties are the ancestral and joint family properties of plaintiff and defendants, has produced the



documents marked as Ex.P1 is the RTC extract in respect of land bearing Sy.No106 of the year 2005-06, the said land stood in the name of Sannaiah and Jayamma, Ex.P2 is the RTC extract in respect of land bearing Sy.No.186 of the year 2005-06, the said land stood in the name of Parvathamma, Ex.P3 is the assessment extract of building and lands in respect of property No.7674/6444, stands in the name of Sannaiah, Ex.P4 is the assessment extract of building and lands in respect of property No.4847/11606 stands in the name of defendant No.1, Ex.P5 is the copy of the pension payment order which discloses that the plaintiff is getting pension from Government of Karnataka, Ex.P6 is the nomination list, Ex.P7 is the nomination from, Ex.P8 is the copy of the mutation extract, Ex.P9 is the certificate issued by the District hospital Chitradurga, wherein, Nagaraj has made with an accident and suffered an injury, Ex.P10 to P14 are the photographs, Ex.P15 is the ration card which stood in the name of Nagaraj i.e., plaintiff, Ex.P16 and P17 are the certified copy of the order passed in MC.No.22/1977, wherein, Shankarappa filed a



petition for dissolution of Marriage against Shivagangamma, the said petition came to be allowed vide order dated 26.07.1978, Ex.P17 is the copy of the decree passed in MC.No.22/1977.

23. In the course of cross examination of PW1 it is elicited that her marriage was performed with the Shankarappa as per the customs prevailed in their community and further she also admitted that she has also performed second marriage with Nagaraj as per the customs prevailed in their community. It is elicited that Nagaraj and DW1 belongs to Adi-Karnataka caste and her father's home town is Haliyur in Chitradurga taluk, Nagaraj's father Sannaiah lived in Chitradurga city, the distance between the Haliyur and Chitradurga is about to 11 to 12 kilometers. Sannaiah's wife Halamma they were alive at that time when they came to her house for alliance. It is true that Sannaiah died in 27.12.1998. It is true that after his retirement he lived with his wife in his own house.



24. From the perusal of the entire cross examination of PW1, the entire cross examination is based only on the customs ceremony performed at the time of marriage and she has denied that she is not the wife of Nagaraj and also denied that in order to grab the properties of father and mother of Nagaraj, she is claiming to be the wife of deceased Nagaraj.

25. Further plaintiff also examined one witness as PW2, he has deposed that he knows the plaintiff and defendants and he has seen suit schedule properties and the suit schedule properties are the ancestral and joint family properties of plaintiffs and defendants and further the said properties are mutated. He has also stated that the suit schedule properties belongs to plaintiff, his mother and father and the joint family properties. After the demise of Sannaiah, the said properties are devolved upon the plaintiff.

26. In rebuttal defendant No.2 was examined as DW1, she has reiterated the written statement averments



in the examination in chief and in support of her contention, she has produced documents, Ex.D1 is the certified copy of the registered sale deed, Ex.D2 is the Saguivail chit, Ex.D3 is the copy of the Will executed by Sannaiah in favour of defendant No.2, Ex.D4 to D8 are the RTC extracts, Ex.D9 is IHC, Ex.D10 is the certified copy of the registered sale deed, Ex.D11 is the original sale certificate, Ex.D12 is the certified copy of the execution petition No.101/2003.

27. In the course of cross examination, it is denied that suit schedule properties are the joint family properties of Sannaiah and she has stated that she is not familiar with plaintiff and admitted that Halamma was with her and almost all 10 years, since from the death of her father and father had a different house and use to live in the said house and mother is still with her and parents are residing with her since from her marriage. She also denied that she had forced her father to create a document. Father use to oblige her as she being the daughter and admit that a



plaintiff got married to Shivagangamma and they have no children. Further defendant also examined one witness Parvathamma D/o one Shreekanthappa as DW2 and she has deposed that she knows the plaintiff and defendants and Shivagangamma and her elder sister name is Chinnakka and her brother name is Shankrappa and further defendants also examined one witness Basavraja as DW3, he submits that the defendant No.2 is his wife and defendant No.1 is his mother-in-law and plaintiff is the brother of his wife and further it is the case of defendant that Sannaiah has executed a Will bequeathing the item Nos.1 to 3 of suit schedule properties in favour of defendant No.2. DW4 is the scribe and DW5, who has drafted the Will on the instructions of Sannaiah. The said Will is marked as Ex.D3 and his signature is marked as Ex.D3(a).

28. During the course of cross examination, DW5 admitted that he drafted several deeds. It is elicited that he cannot say which documents he has written unless the



said documents have seen and he does not remember the father name of Sannaiah. He has deposed that on the instructions of Sannaiah, he has drafted the Will, further in the course of cross examination, it is denied that the said Will was got created in collusion with defendant No.2 and further DW5 has deposed that he has typed the will as per the Ex.D3

29. In the course of cross examination, it is elicited that he has not stated that the testator has signed in his presence and he does not know how many persons were presented at the time of Sannaiah giving instruction to the DW4 and DW5 has typed the Ex.D3.

30. From the perusal of records it disclose that the suit schedule properties were owned and possessed by Sannaiah. It is the case of the defendants that Sannaiah has executed a Will in favour of defendant No.2 bequeathing item Nos.1 to 3. Further the defendants have filed a memo reporting the death of attesting witnesses. The burden is on the defendants to prove execution of Will



by Sannaiah in favour of defendant No.2. Further in the instance case, both the attesting witnesses are dead and no witnesses who are well acquainted with signature of attesting witnesses, have been examined to prove the attestation of the Will.

31. On the contrary, defendants are examined the scribes as DW4 and DW5, who has typed the Ex.D3, the evidence only shows the testator had executed a Will. Defendants have not laid any evidence to establish that the testator was in sound state of mind at the time of execution of the Will. Further DW4 and DW5 have not spoken about due attestation of the Will. Unless the attestation of the Will is proved in accordance with law, the will is not proved. The evidence on record do not prove the attestation of the Will.

32. The trial court was not justified in holding that the defendants have proved the execution of the Will i.e., Ex.D3 and committed an error in placing a reliance on the said documents and further though, DW4 has identified



the signatures of the attesters mere identification of the signature and handwriting of the scribe will not prove that the document was executed by executor and therefore, the defendants have failed to prove execution of Ex.D3. Whether from the evidence of DW4 and DW5 the mandatory requirements of Section 69 of the Indian Evidence Act, has been fulfilled, is the point for consideration. Ex.D3 neither proved in terms of Section 68 nor Section 69 of the Indian Evidence Act. Though, the provisions contemplate that if attesting witness cannot be found or if the document purports to have been executed then it must be proved that the attestation of one of the attesting witness is in his handwriting and that the signature of the person executed in the document is in the handwriting of dead person.

33. The provisions contemplates that handwriting of at least one attesting witness and the signature of the person executed in the document is required to be identified and proved through the witnesses. The proof of



handwriting or the signature of the scribe is not the stipulation under Section 69 of the Evidence Act. Hence, the evidence of DW4 merely identified the handwriting and also the signature of the scribe of Ex.D3 is of no legal consequences and does not meet the stipulation under Section 69 of the Evidence Act.

34. The Hon'ble Apex Court in the case of ***Moturu Nalini Kanth Vs Gainedi Kaliprasad (dead through Lrs)*** reported in ***(2023) SCC online SC 1488***, considering the provisions of Section 68 and 69 of the Indian Evidence Act and placing reliance on one of the judgment of Hon'ble Apex Court held as under para 32:

"32. For the purposes of Section 69 of the Evidence Act, it is not enough to merely examine a random witness who asserts that he saw the attesting witness affix his signature in the Will. The very purpose and objective of insisting upon examination of at least one attesting witness to the Will would be entirely lost if such requirement is whittled down to just having a stray witness depose that he saw the attesting witness sign the Will. The evidence of the scribe of the disputed Will (PW 6) also casts a doubt on the identity of the executant as he specifically stated that a woman was sitting at a distance but he could not tell whether she was Venkubayamma and he could not also tell whether Venkubayamma had signed the document. In effect,



Ex. A10 Will was not proved in accordance with law and it can have no legal consequence. Nalini Kanth's claim of absolute right and title over Venkubayamma's properties on the strength thereof has, therefore, no legs to stand upon and is liable to be rejected."

35. From the perusal of evidence of DW4 and DW5 have not deposed that the attesting witnesses have affixed their signatures in the Will and also the testator. The defendants have failed to prove the execution of a Will. Though, the Ex.D3 is the registered document, mere registration would not satisfy a document by attaching to it an irritable presumption of genuineness and further in order to prove, it is well established principles of law that for a Will to be proved as a genuine, it must complied with a requirements prescribed in the Indian Evidence Act, 1872 and Indian Succession Act, 1925, in arriving at its decision the Hon'ble Apex Court in the case of ***Dhani Ram (Died) Through Lrs. and Others Vs. Shiv Singh (Dhani Ram)*** reported in ***2023 SCC online SC 1263*** in Civil Appeal No.8172/2009 disposed of on 06.10.2023, mere registration of Will would not be sufficient to prove



its validity as its lawful execution, necessarily has to be proved in accordance with Section 68 of Indian Evidence Act and 63 of Indian Succession Act.

36. In view of the above discussion the Courts below have committed an error in passing impugned judgments. The impugned judgments passed by the Courts below are arbitrary and erroneous.

37. In view of the above discussion, I answered substantial question in the Negative. Hence, I proceed to pass the following:

ORDER

- i. Appeal is ***allowed***.
- ii. The impugned judgment and decree dated 20.10.2012 passed in RA No.29/2010 by the Prl. District and Sessions Judge, Chitradurga and also judgment and decree dated 17.12.2009 passed in O.S.No.86/2006 by the II Addl. Senior Civil Judge, Chitradurga are set aside.



- iii. Suit of the plaintiff is decreed.
- iv. The plaintiff is entitle for ½ share in the suit schedule properties by metes and bounds.
- v. Draw preliminary decree, accordingly.
- vi. No order as to the costs.

In view of the disposal of the appeal, IA No.3/2013 does not survive for consideration.

**Sd/-
JUDGE**

AT

CT:KHZ