A S. SUNDARESA PAI AND ORS.

v.

MRS. SUMANGALA T. PAI AND ANR.

NOVEMBER 28, 2001

B [R.P. SETHI AND Y.K. SABHARWAL, JJ.]

Wills :

Execution of the documents—Legality of—Uneven distribution of assets by the testator—Cannot render the document illegal—Such distribution is pure discretion of the executant.

C

Respondent No. 1 filed a suit against the appellant, respondent No. 2 and her father claiming 1/6th share of the properties left behind by her mother dying intestate. Appellants, respondent No. 2 and their father D **submitted that the property of their mother should be dealt according to the Will. Trial Court dismissed the suit holding that the Will had been duly proved. High Court set aside the order. Since the father of respondent No. 1 died during the pendency of the suit, she amended the plaint claiming 1/5th share of property instead of 1/6th share. High Court remanded the suit** E **to the Trial Court. Hence the present appeal.**

Allowing the appeal, the Court

HELD : 1.1. The uneven distribution of assets by the testator amongst children , by itself, cannot be taken as a circumstance causing suspicion F **surrounding the execution of the Will. The distribution of assets lies squarely within the pure discretion of the executant of the Will. [368-G-H]**

1.2. In the instant case all the appellants and respondent No. 2 supported the uneven distribution of assets in the Will. Only respondent G **No.1 questioned the Will. Respondent No. 2-widowed daughter did not question the uneven distribution of the assets; rather supported it even though she was more deserving. The Will had been formally proved in view of the testimony of the attesting witness. Further, the non-registration of the Will executed by the mother and registration of the Will executed by** H **the father of respondent No. 1 does not create any doubt about the due**

execution of the Will. Thus, the finding that the Will was not proved and is unnatural on the basis of uneven distribution of assets by the testator cannot be sustained. [368-G;H; 369-C; G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5301 of 1992.

From the Judgment and Order dated 19.12.90 of the Kerala High Court in A.S. No. 56 of 1986.

C.S. Vaidyanathan, Ramy Chako, Lakshmi Narayana, S.S. Khanduja, Gopal Krishnan for the Appellants.

E.M.S. Anam for the Respondents.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. Respondents 1 and 2 in this appeal are daughters of one Indira Bai. Appellants are her three sons. Indira Bai died on 13th November, 1981.

In April, 1983, respondent no.1 instituted a suit against the appellants, respondent no.2 and her father claiming that Indira Bai died intestate on 13th November, 1981 and she is entitled to 1/6th share in the properties left behind by her. She also pleaded that if there is any Will that is forged. All the defendants, namely, father, three brothers and one sister of the plaintiff/respondent no. 1 took the stand that Indira Bai had left behind a Will dated 26th August, 1981 and her properties are to be dealt with as per the Will. The father of respondent no. 1 who was defendant no. 1 in the suit died during the pendency of the suit.

On appreciation of evidence the trial court held that the Will had been duly proved and the suit was dismissed. In the first appeal, the judgment of the trial court was reversed by the High Court. The findings of the trial court upholding the Will dated 26th August, 1981 were reversed by the impugned judgment. It was held that the will had not been proved and the plaintiff was entitled to 1/6th share in the assets of Indira Bai. Since the husband of Indira Bai died during the pendency of the suit and respondent no.1 disputed the execution of will by her father and proceeding on the basis that her father died

A intestate, the plaintiff by amending the plaint claimed 1/5th share instead of 1/6th in the estate of Indira Bai. The High Court directed remand of the suit to the trial court for fresh disposal in the light of the findings in respect of the will dated 26th August, 1981. The trial court was directed to decide whether respondent no.1 inherited 1/6th or 1/5th share in the estate of Indira Bai. The B judgment of the High Court has been challenged in this appeal by sons of Indira Bai. The other sister supporting the appellants is respondent no.2 in the appeal.

The two attesting witnesses to the will of Indira Bai are her husband and an advocate. The advocate appeared in the suit as a witness (DW-2). Admittedly he was the family lawyer of the defendants. The High Court has recorded C a finding that "Undoubtedly there is a formal evidence of execution of the will, that is, Indira Bai signing the Will in the presence of attestators and the attestators signing the Will in the presence of Indira Bai." After this finding, the High Court examines the circumstances and comes to the conclusion that the will was unnatural and in this view the finding of the trial court upholding D the will was reversed.

The main reason which weighed with the High Court for its conclusion that the will was unnatural was uneven distribution of the assets by Indira Bai and also that the will did not give anything to the widowed daughter. According E to the High Court this daughter was 'perhaps more deserving'. It also noticed that the Will gave bulk of immovable properties to only one son. Another son was not given any immovable property. The third son was given one half share in only one immovable property and the other half of it was given to respondent no.1. Indira Bai in the will also did not give anything to her husband. All F movables as per the will were given to the three sons equally.

It is significant to note that only the plaintiff has questioned the will. All the defendants were supporting the will. The High Court also found that in view of the testimony of the attesting witness, the Will had been formally proved. Under these circumstances, we fail to understand how the conclusion about the G will being unnatural on the basis of uneven distribution of the assets by Indira Bai could be reached. The widowed daughter had not questioned the will. She rather supported it. Therefore, it could not be taken as a circumstance to show that the Will was unnatural by observing that she was more deserving. It is a question which lies squarely within the pure discretion of the executant of the H Will. The finding that the "Will is most unnatural" cannot be sustained.

Learned counsel for plaintiff/respondent no.1, supporting the impugned judgment also laid strong emphasis on uneven distribution of the assets which, according to him, shows the suspicious circumstances in respect of the execution of the Will. The uneven distribution of assets amongst children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the Will. One son was given bulk of immovable properties; another none; another half share in one immovable property; other half being given to the plaintiff and another daughter and husband were given nothing. It is also not in dispute that some properties were given in gift to the plaintiff by her mother during her life time. There was nothing unnatural. Learned counsel for respondent no.1 also sought to rely upon certain other circumstances which, according to him, raise suspicion about due execution of will. It was contended that the Will in question was not registered in spite of the fact that the will executed by her husband was registered. This circumstance does not create doubt about the due execution of the Will. There is nothing unnatural in the will made by the husband being registered and not that of his wife. Further, DW-2, an advocate of the family who was attesting witness of both the wills, explained in his testimony that because of the litigation in respect of the will of his wife, husband insisted that his Will must be registered.

It was then pointed out that the factum of the Will was not disclosed in the correspondence between the plaintiff and her father which was exchanged after her mother's death and before filing of the suit. A perusal of the plaint shows that it is plaintiff's own case that in earlier litigations between brother and sister, the Will of Indira Bai had been set up and admittedly the correspondence between the plaintiff and her father ensued later. It appears that in proceedings in relation to estate duty and wealth tax, the factum of the will had been disclosed. The further fact that there was acrimony between the plaintiff and her father, if at all, may be a circumstance which may show why a large share in the estate was not given to the plaintiff. As already noticed, only plaintiff was questioning the Will. Others were supporting the Will. The plaintiff cannot be permitted to urge that since nothing or almost nothing substantial was provided for in the Will for others, it creates suspicion about execution of the Will. The execution of the Will having been proved by the attesting witness, on the facts and circumstances noticed above, no presumption could be drawn against the defendants for not having filed other admitted documents of Indira Bai for purpose of comparing her signatures on the Will. The plaintiff was disputing the Will. She did not take any steps for the production of the docu-

A ments containing the admitted signatures of Indira Bai. In respect of documents produced by her the High Court observed that the evidence was not sufficient to show that the signatures contained in those documents were those of Indira Bai. The trial court had rightly relied upon the testimony of DW2. The finding of the High Court that the will of Indira Bai had not been proved cannot be
B sustained.

For the aforesaid reasons, we set aside the impugned judgment of the High Court and restore that of the trial court. The appeal is accordingly allowed with costs.

N.J. Appeal allowed