APOLINE D' SOUZA

v.

JOHN D' SOUZA

MAY 16, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Succession Act, 1925—ss. 276 and 63—Letter of administration—Grant of—Testatrix executed Will bequeathing property in favour of his nephew and other who was not related—Trial Court holding execution of Will proved, however, set aside by High Court—Held: Due execution of Will was not proved—Evidence of attesting witness also did not prove execution or attestation of Will—Will contained overwriting and cuttings which established existence of suspicious circumstances—Thus, order of High Court upheld—Evidence Act, 1872—s. 68.

F executed a Will bequeathing 23 cents of land in favour of the appellant and 16 cents in favour of the respondent. F had two daughters who were nuns. Appellant-beneficiary of the Will was not related in any way to F. It is alleged that the appellant was serving the testatrix during her old age and on account of which was made the beneficiary. Appellant filed an application for grant of Letters of Administration under section 276 of Succession Act, 1925. Respondent contended that F being an old lady was not in proper frame of mind at the time of execution of Will to understand its contents. Trial court held that the execution of Will was proved. However, the High Court set aside the order. Hence, the present appeal.

Dismissing the appeal, the Court

HELD : 1.1. The mode and manner of proof of due execution of a Will indisputably will depend upon the facts and circumstances of each case. It is for the propounder of the Will to remove the suspicious circumstances.

[Para 20] [1112-F]

1.2. The testatrix was a 96 years old lady. She had been suffering for a long time. She was bed-ridden. No evidence has been brought on record to show as to who had drafted the Will. Even if it be assumed that the appellant had nothing to do in regard to preparation of the draft or registration thereof,

A nothing has been brought on record to show as to who had drafted the Will, or at whose instance it came to be registered.

[Paras 8 and 9] [1107-G; 1108-A]

1.3. Section 68 of the Evidence Act, 1872 provide for the mode and manner in which execution of the Will is to be proved. Proof of attestation of
B the Will is a mandatory requirement. Attestation is sought to be proved by PW-2 only. PW-2 is the attesting witness. She was called to be a witness to the execution of the Will. PW-2 categorically stated that the Will was drafted before her coming to the residence of the testatrix and she had only proved her signature as a witness to the execution of the Will but the document was
C a handwritten one. The original Will is typed in Kannada, although the blanks were filled up with English letters. There is no evidence to show that the contents of the Will were read over and explained to the testatrix. Two days thereafter, the Will was registered, on which date also she was asked to be present. PW-2 was not known to the testatrix. Why was she called and who called her to attest the Will is shrouded in mystery. Her evidence is not at all
D satisfactory in regard to the proper frame of mind of the testatrix. There were several cuttings and overwriting also in the Will.

[Paras 10 and 13] [1108-A, H; 1109-B, C]

1.4. Both the daughters of the testatrix were nuns. Therefore, no property could be bequeathed in their favour. In fact one of them had expired
E long back. Relation of the testatrix with the respondent admittedly was very cordial. Appellant has not been able to prove that she had been staying with the testatrix since 1986 and only on that count she was made a beneficiary thereof. The Will was full of suspicious circumstances.

[Para 13] [1109-A]

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Naresh Charan Das Gupta v. *Paresh Charan Das Gupta,* [1954] SCR 1035, distinguished.

B. Venkatamuni v. *C.J. Ayodhya Ram Singh & Ors.,* (2006) 11 SCALE 149; *Niranjan Umeshchanda Joshi* v. *Mrudula Jyoti Rao & Ors.,* (2006) 14
G SCALE 186; *Joseph Antony Lazarus (Dead) By LRs.* v. *A.J. Francis,* [2006] 9 SCC 515; *S. Sankaran* v. *D.Kausalya,* (2007) 3 SCALE 186; *Benga Behera & Anr.* v. *Braja Kishore Nanda & Ors.,* CA No.3467 of 2003 decided by S.C. on 15.05.2007; *Brahmadat Tewari* v. *Chaudan Bibi,* AIR 1916 Calcutta 374 and *Riazulnisa Begam, Mst.* v. *Lala Puran Chand,* ILR XIX Lucknow 445, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4608 of 2003. A

From the Final Judgment and Order dated 12.2.2002 of the High Court of Karnataka at Bangalore in MFA No. 2570 of 1997. (ISA).

Dr. M.P. Raju, P. George Giri and S.P. Sharma for the Appellant.

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Suvrajyoti Gupta (for Meenakshi Arora) for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Florine D' Souza executed a will on or about 06.05.1992. She had two daughters Olivia and Olympia. Both of them had become nuns. C The 1st daughter Olivia died in 1975. The 2nd daughter Olympia died on 27.09.1993.

2. Appellant herein was one of the beneficiaries of the will. He was, however, not in any way related to the testatrix. The testatrix was owner of the following properties which were subject-matter of the said will : D

"'A' SCHEDULE

.... E

Property situated in Talipady Village, Mangalore Taluk, Mulki Sub-Division D.K. bearing following particulars :

S. No.	S.D. No.	Kissam	Extent A.C.	Assessment Rs. Ps.
123	- 1A1B (P)	Garden	0 - 16	F

BOUNDARIES :

East :	Property allotted to 'B' Schedule belongs to the Same sub-Division.
South :	Portion of Sy. No. 123/1A1A G
West :	Portion of Sy. No. 123/1A1A
North :	Sy Line

With tiled house bearing No. 8-87, with all mamool and easementary rights with all appurtenants and also all the movables belonging to me." H

A "'B' SCHEDULE'

....

Property situation in Thalipady Village, Mulki S.D. Mangalore Taluk, D.K. Bearing following particulars :

B	S. No.	S.D. No.	Kissam	Extent A.C.	Assessment Rs. Ps.
	123	1A1B (P)	Garden	0 - 23	

BOUNDARIES :

C		
	East :	Portion of the Sy. No. 123/5, 123/3, 123/1A1B
	South :	Portion of Sy. No. 123/1A1A
	West :	Property allotted to 'A' Schedule of same Sub-Division
D	North :	Sy. Line
	123-5	Garden 0-09

With a tiled house, timbers all mamool and easementary rights"

3. Whereas the property described in Schedule 'A' appended to the said E will was bequeathed in favour of the appellant, the property described in Schedule 'B' thereto was bequeathed in favour of the respondent. Florine died on 13.03.1994. An application for grant of Letters of Administration with a copy of the will annexed, in terms of Section 276 of the Indian Succession Act, 1925 (for short 'the Act') was filed by the appellant. Respondent entered a caveat.

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4. The plea raised by the respondent in the suit was that the testatrix was an aged woman and did not have a proper frame of mind at the time of purported execution of the will to understand the contents thereof.

5. The learned Trial Judge held that the execution of the will had been G proved, stating :

"...Circumstances go to show that the defendant had constructed his own house in one portion of the land that belonged to the old lady. 23 cents of land was given to the defendant under the will and 16 cents of land including the old house was given to the plaintiff who

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attended the old lady during her old age. I do not find anything unnatural in the bequest made by the old lady. She has given larger extent of land to the defendant who is the son of the sister of the Testatrix. That shows that the disposition made by her was consistent with the natural course of human conduct." A

It was held that as the propounder did not take any interest in the matter of execution of the will, no suspicious circumstances existed. B

6. The High Court, however, reversed the said finding of the learned Trial Judge by reason of the impugned judgment, opining :

i) PW-2, the only attesting witness, examined in the matter, admitted that she had put her signature on a handwritten will, whereas the will had in fact been typed in Kannada language. Hence the due execution of the will was not proved. C

ii) The will contained various overwritings and cuttings, which establish existence of suspicious circumstances. D

iii) Evidence of PW-2 does not prove either execution or attestation of the will as per Ex. P-2, as the thumb mark affixed by Florine D' Souza on it was not got marked in the evidence of PW-2 and she had not identified the thumb mark on Ex. P-2 as the thumb mark which was affixed by Florine D' Souza in her presence. E

iv) Mere fact that the will was a registered one would not dispense with the requirements of proof of due execution and attestation of the will for grant of Letters of Administration.

7. Dr. M.P. Raju, learned counsel appearing on behalf of the appellant, however, submitted : F

i) The proof of execution of the will cannot be discarded only because all the precedent requirements of law had not been fulfilled.

ii) As it was proved that the plaintiff-appellant was serving the testatrix since 1986, there was no reason to disbelieve the bequest made in her favour by way of a will. G

8. The testatrix was a 96 years old lady. She had been suffering for a long time. She was bed-ridden. No evidence has been brought on record to show as to who had drafted the will.

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A 9. Even if it be assumed that the appellant had nothing to do in regard to preparation of the draft or registration thereof, nothing has been brought on record to show as to who had drafted the will, or at whose instance it came to be registered.

10. PW-2 is the attesting witness. She was called to be a witness to the B execution of the will. On or about 06.05.1992, when she had come to the house of the testatrix, the will had already been written. According to her, only after she had come, the testatrix put her L.T.I.. Two days thereafter, the will was registered, on which date also she was asked to be present.

11. The High Court has arrived at a conclusion that the execution of the C will has not been proved in accordance with law.

12. What should be the mode of proof of execution of a will has been laid down in Section 63 of the Act in the following terms :

D "63. Execution of unprivileged wills.-Every testator, not being a solider employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules :

(a) The testator shall sign or shall affix his mark to the will, or it shall E be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

F (c) The will shall be attested by two or more witnesses, each of whom has seen 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 acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall G 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."

13. Section 68 of the Indian Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation H of the will is a mandatory requirement. Attestation is sought to be proved by

PW-2 only. Both the daughters of the testatrix were nuns. No property, therefore, could be bequeathed in their favour. In fact one of them had expired long back. Relation of the testatrix with the respondent admittedly was very cordial. Appellant before us has not been able to prove that she had been staying with the testatrix since 1986 and only on that count she was made a beneficiary thereof. The will was full of suspicious circumstances. PW-2 categorically stated that the will was drafted before her coming to the residence of the testatrix and she had only proved her signature as a witness to the execution of the will but the document was a handwritten one. The original will is typed in Kannada, although the blanks were filled up with English letters. There is no evidence to show that the contents of the will were read over and explained to the testatrix. PW-2 was not known to her. Why was she called and who called her to attest the will is shrouded in mystery. Her evidence is not at all satisfactory in regard to the proper frame of mind of the testatrix. There were several cuttings and overwritings also in the will.

14. What would be the requirement for proof of a will has recently been considered by this Court in *B. Venkatamuni* v. *C.J. Ayodhya Ram Singh & Ors.*, [2006] 11 SCALE 149, stating :

> "15. Proof of a Will shall strictly be in terms of the abovementioned provisions.
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> 16. It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed :

> "20. Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

It was further observed :

> "24. However, having regard to the fact that the Will was registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court

affirmatively that the testator did not know well the contents of the Will and in sound disposing capacity executed the same.

25. Each case, however, must be determined in the fact situation obtaining therein.

26. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

27.The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the records. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said court. It applied a wrong legal test and thus, came to an erroneous decision."

15. Yet again in *Niranjan Umeshchanda Joshi* v. *Mrudula Jyoti Rao & Ors.*, [2006] 14 SCALE 186, this court observed :

"32. Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that

he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See *Madhukar D. Shende* v. *Tarabai Shedage,* [2002] 2 SCC 85 and *Sridevi & Ors.* v. *Jayaraja Shetty & Ors.,* [2005] 8 SCC 784. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

Noticing *B. Venkatamuni* (supra), it was observed:

"36. The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

37. We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion. [See *Venkatachala Iyengar* (supra)]"

[See also *Joseph Antony Lazarus (Dead) By LRs.* v. *A.J. Francis,* [2006] 9 SCC 515].

16. In *S. Sankaran* v. *D. Kausalya,* [2007] 3 SCALE 186, it was stated:

"6. A learned Single Judge of the High Court by his judgment dated 25.5.1996 held that the will dated 24.9.1986 was genuine and was not a forged one. The learned Single Judge took into consideration various factors e.g. that the testator himself presented the will for execution, and there was a dispute between the testator and his elder daughter and hence he wanted to bequeath his properties to his second daughter and the sons born to her, etc.

7. In appeal the Division Bench of the Madras High Court set aside the judgment of the learned Single Judge but without a proper

A consideration of the various facts and circumstances of the case mentioned by the learned Single Judge in his very elaborate judgment.

8. The Division Bench was evidently influenced by the fact that the elder daughter was deprived of her share in her father's property. However, the Division Bench has not taken into consideration the various considerations which according to learned Single Judge motivated the testator to deprive his elder daughter, the respondent herein."

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[See also *Benga Behera & Anr.* v. *Braja Kishore Nanda & Ors.* C.A. No.3467 of 2003, disposed of on 15.05.2007]

C 17. Reliance placed by Dr. Raju on *Brahmadat Tewari* v. *Chaudan Bibi* AIR (1916) Calcutta 374 and *Riazulnisa Begam, Mst* v. *Lala Puran Chand* [ILR XIX Lucknow 445] are misplaced.

18. The requirements to prove execution of the will are laid down under Section 63 of the Act only in the year 1925. The law has since undergone a D change. In any event, this Court is bound by the decisions of this Court.

19. In *Naresh Charan Das Gupta* v. *Paresh Charan Das Gupta,* [1954] SCR 1035 whereupon again reliance has been placed, this Court has categorically held :

E "....It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted...."

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20. The ratio of the said decision does not assist the appellant, as the mode and manner of proof of due execution of a will indisputably will depend upon the facts and circumstances of each case. It is for the propounder of the will to remove the suspicious circumstances, which has not been done G in this case.

21. For the reasons aforementioned, there is no merit in this appeal, which is accordingly dismissed. In the facts and circumstances of the case, there shall, however, be no order as to costs.

H N.J. Appeal dismissed.