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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9TH DAY OF OCTOBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

REGULAR SECOND APPEAL NO. 1773 OF 2013 (DEC/INJ)

C/W

REGULAR SECOND APPEAL NO. 1774 OF 2013 (DEC/INJ)

REGULAR SECOND APPEAL NO. 1775 OF 2013 (DEC/INJ)

IN RSA NO.1773/2013:

BETWEEN:

SMT GOWRAMMA
W/O LATE MALALI GOWDA
SINCE DEAD BY LRS

1 . CHANDREGOWDA
AGED ABOUT 70 YEARS
S/O LATE SRI PUTTEGOWDA
R/O VEERAPURA VILLAGE
SALAGAME HOBLI
HASSAN TALUK - 573 219
SINCE DEAD BY HIS LRS

1(a) SMT MOHANAKSHAMMA,
AGED ABOUT 60 YEARS,
W/O LATE CHANDREGOWDA,

1(b) SRI CHIDANANDA,
AGED ABOUT 37 YEARS,
S/O LATE CHANDRE GOWDA,

1(c) SRI NANDISHA,
AGED ABOUT 35 YEARS,
S/O LATE CHANDRE GOWDA,
ALL ARE RESIDENTS OF VEERAPURA VILLAGE,
HASSAN TALUK, HASSAN DISTRICT - 573219.

...APPELLANTS

(BY SRI A RAVISHANKAR, ADVOCATE FOR APPELLANTS (A TO C))





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AND

SRI V S MAHANTHE GOWDA,
AGED ABOUT 45 YEARS,
S/O SRI SHETTI GOWDA,
R/O VEERAPURA VILLAGE, SALAGAME HOBLI,
HASSAN TALUK - 573 219.

...RESPONDENTS

(BY SRI A V GANGADHARAPPA, ADVOCATE FOR
SMT K T PREMALATHA, ADVOCATE)

THIS RSA IS FILED U/S. 100 OF CPC., AGAINST THE
JUDGEMENT & DECREE DTD 1.8.2013 PASSED IN
R.A.NO.6/2008 ON THE FILE OF THE PRL. SENIOR CIVIL
JUDGE, HASSAN, DISMISSING THE APPEAL AND CONFIRMING
THE JUDGEMENT AND DECREE DTD 28.11.2007 PASSED IN
OS.NO.448/1991 ON THE FILE OF THE II ADDL. CIVIL JUDGE
(JR.DN) & JMFC., II COURT, HASSAN.

IN RSA NO.1774/2013:

BETWEEN:

- 1 . CHANDREGOWDA
SINCE DEAD BY HIS LRS

- 1(a) SMT MOHANAKSHAMMA,
AGED ABOUT 60 YEARS,
W/O LATE CHANDREGOWDA,

- 1(b) SRI CHIDANANDA,
AGED ABOUT 37 YEARS,
S/O LATE CHANDRE GOWDA,

- 1(c) SRI NANDISHA,
AGED ABOUT 35 YEARS,
S/O LATE CHANDRE GOWDA,
ALL ARE RESIDENTS OF VEERAPURA VILLAGE,



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RSA No. 1775 of 2013

HASSAN TALUK, HASSAN DISTRICT - 573219.

...APPELLANTS

(BY SRI A RAVISHANKAR, ADVOCATE)

ⁿ
AND

- 1 . SRI V S MAHANTHE GOWDA
S/O SRI SHETTI GOWDA
AGED ABOUT 45 YEARS
- 2 . SMT VEDAVATHI
D/O SHETTI GOWDA
AGED ABOUT 43 YEARS
- 3 . DEVI
D/O SHETTI GOWDA
AGED ABOUT 41 YEARS
- 4 . SMT JAYAMMA
W/O SHETTI GOWDA
AGED ABOUT 75 YEARS
ALL ARE R/O VEERAPURA VILLAGE, SALAGAME HOBLI
HASSAN TALUK - 573 219

...RESPONDENTS

(BY SRI A V GANGADHARAPPA, ADVOCATE FOR
SMT K T PREMALATHA, ADVOCATE FOR R1
R2 TO R4 SERVED)

THIS RSA IS FILED U/S. RSA FILED U/S. 100 OF CPC.,
AGAINST THE JUDGEMENT & DECREE DATED 01.08.2013
PASSED IN R.A.NO.7/2008 ON THE FILE OF THE PRL. SENIOR
CIVIL JUDGE, HASSAN, DISMISSING THE APPEAL AND
CONFIRMING THE JUDGEMENT AND DECREE DTD 28.11.2007
PASSED IN OS.NO.136/1992 ON THE FILE OF THE II ADDL.
CIVIL JUDGE (JR.DN) & JMFC., II COURT, HASSAN.



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RSA No. 1775 of 2013

IN RSA NO.1775/2013:

BETWEEN:

1 . CHANDREGOWDA
SINCE DEAD BY HIS LRS

1(a) SMT MOHANAKSHAMMA,
AGED ABOUT 60 YEARS,
W/O LATE CHANDREGOWDA,

1(b) SRI CHIDANANDA,
AGED ABOUT 37 YEARS,
S/O LATE CHANDRE GOWDA,

1(c) SRI NANDISHA,
AGED ABOUT 35 YEARS,
S/O LATE CHANDRE GOWDA,

ALL ARE RESIDENTS OF VEERAPURA VILLAGE,
HASSAN TALUK, HASSAN DISTRICT - 573219.

...APPELLANTS

(BY SRI A RAVISHANKAR, ADVOCATE)

AND

SRI V S MAHANTHE GOWDA
S/O SRI SHETTI GOWDA
AGED ABOUT 45 YEARS
R/O VEERAPURA VILLAGE, SALAGAME HOBLI
HASSAN TALUK-573219

...RESPONDENTS

(BY SRI A V GANGADHARAPPA, ADVOCATE FOR
SMT K T PREMALATHA, ADVOCATE)

THIS RSA IS FILED U/S. 100 OF CPC., AGAINST THE
JUDGEMENT & DECREE DTD 1.8.2013 PASSED IN
R.A.NO.6/2008 ON THE FILE OF THE PRL. SENIOR CIVIL
JUDGE, HASSAN, DISMISSING THE APPEAL AND CONFIRMING
THE JUDGEMENT AND DECREE DTD 28.11.2007 PASSED IN



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OS.NO.448/1991 ON THE FILE OF THE II ADDL. CIVIL JUDGE (JR.DN) & JMFC., II COURT, HASSAN.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 03RD SEPTEMBER, 2025 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

CAV JUDGMENT

RSA No.1773/2013 arises from judgments and decrees in O.S. No.448/1991 on the file of II Additional Civil Judge (Jr.Dn), Hassan and RA No.6/2008 on the file of the Principal Senior Civil Judge, Hassan.

2. RSA No.1774/2013 arises from judgments and decrees in O.S. No.136/1992 on the file of II Additional Civil Judge (Jr.Dn), Hassan and RA No.7/2008 on the file of the Principal Senior Civil Judge, Hassan.

3. RSA No.1775/2013 arises from judgment and decrees in O.S. No.117/1994 on the file of II Additional Civil Judge (Jr.Dn), Hassan and RA No.8/2008 on the file of the Principal Senior Civil Judge, Hassan.

4. Since the parties to the aforementioned proceedings are same, all three appeals are clubbed together. All three



suits referred to above and all three First Appeals referred to above were disposed of by common judgment.

5. RSA No.1773/2013 was admitted on 30.07.2014 to resolve the following substantial questions of law

"i) Whether the courts below are justified in ignoring the pleading of Smt. Gowramma since deceased that she had executed a Will dated 28.11.1990 bequeathing the properties to Sri. Chandre Gowda which fact would dispense with the suspicious circumstance if any on the execution of the Will?

ii) Whether the courts below are justified in holding that Chandre Gowda who came on record to prosecute the case establishing that the right to sue survives on him, ought to have pleaded specifically about the manner of his right?

iii) Have not the courts below committed an error in law in not noticing that in view of un disputed fact that Shetti Gowda pre-deceased Malali Gowda, Smt. Gowramma would acquire right in the property as wife of Malali Gowda and as mother of the adopted son?

Alternatively, the question of law would be,

Whether the courts below are right in holding that the claim of adoption advanced on behalf of Setti Gowda that he was adopted on 06.03.1952 by a registered Deed of Adoption on 27.05.1952 is proved?"



6. RSA No.1774/2013 was admitted on 02.08.2014 to resolve the following substantial questions of law

"(i) Whether the courts below were justified in granting decree of declaration to the plaintiffs when admittedly Shetti Gowda pre-deceased Malali Gowda and upon the death of the said co-parceners of a Joint Hindu Undivided family, the widow of Malali Gowda would also get a share being Class-I heir?

(ii) Whether the Courts below were justified in ignoring the pleadings of Smt. Gowramma that she had executed a Will duly registered and held that the Will is brought up in suspicious circumstances:

(iii) Whether the Courts below were justified in granting decree of declaration ignoring the rights of daughter Giddamma of Malali Gowda through his first wife Dyavamma?

(iv) Whether the Courts below were justified in holding that the Adoption Deed dated 06.03.1952 stands proved when admittedly the same is not proved in the manner know to law?"

7. RSA No.1775/2013 was admitted on 30.07.2014 to resolve the following substantial questions of law

"(i) Whether the courts below were justified in ignoring the fact that a co-owner of a joint family property is not entitled to seek the relief of declaration



of title of a joint family property as against another co-owner?

(ii) Whether the courts below were justified in granting the relief of declaration to the sole plaintiff when he himself had sought for the same relief along with his siblings in O.S.No.136/1992, ignoring the force of Order II Rule 2 of CPC?"

8. Heard Sri A.Ravishankar, learned counsel appearing for the appellants in all three appeals and Sri A.V. Gangadharappa, learned counsel appearing for Smt. K.T.Premalatha, learned counsel for the respondents in all three appeals.

9. Certain facts are admitted. One Malali Gowda was the propositus. He died on 12.06.1981. Malali Gowda had two wives - Dyavamma and Gowramma. Both marriages took place before 1955, as such both the marriages are valid.

10. First wife - Dyavamma died on 02.09.1987 and second wife - Gowramma died on 31.12.1992.

11. Second wife - Gowramma filed O.S.No.448/1991 against one Mahanthe Gowda, son of Shetty Gowda. The plaintiff Gowramma in the said suit sought a declaration that she alone



is the owner of the suit schedule properties and sought permanent injunction against sole defendant Mahanthagowda, s/o Shettygowda.

12. The plaintiff in O.S.No.448/1991 alleged that defendant Mahanthagowda asserted that the plaintiff's husband Malaligowda adopted Shettygowda - the father of the defendant. The plaintiff - Gowramma disputed the said adoption.

13. Defendant Mahanthagowda, son of Shettygowda opposed the plaintiff's claim and claimed absolute right over the properties as a successor of his father Shettygowda. The defendant claimed that on 06.03.1952, Malaligowda adopted his father Shettygowda and on 27.05.1952, the adoption deed was registered and after Malaligowda's demise, Shettygowda inherited all the properties of Malaligowda.

14. O.S.No.136/1992 is filed by the children and wife of late Shettygowda. In the said suit, the plaintiffs claimed that the Will dated 28.11.1990 said to have been executed by first defendant Gowramma, 2nd wife of Malaligowda in favour of second defendant is illegal and also sought for a relief of



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cancellation of the said Will on the premise that first defendant has no right to execute the Will.

15. Defendant No.1 Gowramma, and Defendant No.2, Chandregowda, s/o Puttegowda contested the plaintiffs' claim in O.S.No.136/1992 and defendant No.1 asserted that she executed the Will dated 28.11.1990 in favour of defendant No.2 and prayed for dismissal of the suit.

16. O.S.No.117/1994 is filed by Mahanthe Gowda against Chandregowda, the legatee under the alleged Will dated 28.11.1990 said to have been executed by Gowramma. In the said suit, the plaintiff has challenged the order dated 04.03.1994 passed by the Assistant Commissioner, wherein Assistant Commissioner, has directed the entry in the name of Gowramma as well as Shettygowda. Said suit is also contested by Chandregowda based on the Will dated 28.11.1990 executed by Gowramma.

17. During the pendency of O.S.No.448/1991, Gowramma died and Chandregowda came on record as the legal representative of Gowramma under the Will dated



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28.11.1990. Thereafter, common evidence was led by clubbing all three suits.

18. Since Gowramma died during the pendency of O.S.No.448/1991 and the trial Court concluded that the execution of Will is not proved, O.S.No.448/1991 is also dismissed.

19. Suit in O.S.No.136/1992 is decreed. O.S.No.117/1994 is also decreed holding that the order of the Assistant Commissioner is illegal.

20. R.A.No.6/2008 challenging the aforementioned judgment and decree in O.S.No.448/1991 is dismissed.

21. Appeal against the judgment and decree in R.A.No.7/2008 is dismissed confirming the judgment and decree in O.S.No.136/1992.

22. The appeal in R.A.No.8/2009 is allowed in part. The decree setting aside the order of the Assistant Commissioner is set aside and remaining part of the decree in O.S No.117/1994 confirmed.



23. Learned counsel appearing for the appellants raises the following contentions:-

(i) Admittedly, the properties belonged to Malaligowda and he died on 12.06.1981. After his demise, under Section 8 of the Hindu Succession Act, 1956 (for short, "Act, 1956"), the properties would devolve upon Dyavamma - first wife, Gowramma - second wife. In case, the adoption of Shettygowda, is proved, the properties will devolve equally on Shettygowda, Dyavamma and Gowramma.

(ii) The adoption is not established inasmuch as the witnesses to the alleged adoption are not examined. The alleged signature/thumb impression of Gowramma on the adoption deed is disputed even by Gowramma and this being the position, the Trial Court and First Appellate Court could not have held that adoption is proved by referring to Section 90 of the Indian Evidence Act. Since the adoption and the signature on the adoption deed were disputed, it was incumbent upon the defendants/respondents to establish the adoption by leading evidence.



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(iii) Evidence on record would indicate that Shettygowda who claims to be the adopted son, was living in a different village and not with Malaligowda - the alleged adoptive father.

(iv) In the alternative, even if it is assumed that the adoption dated 06.03.1952 is established still after the demise of Malaligowda, Dyavamma and Gowramma would inherit the share of Malaligowda along with Shettygowda. Thus, children of Shettygowda cannot seek a declaration that they are the absolute owners of the suit schedule properties inherited after the demise of Malaligowda.

24. On the proof of due execution of Will dated 28.11.1990, learned counsel for the appellants raised following contentions:

(i) Will is challenged during the lifetime of the testator-Gowramma. Gowramma contested the suit and asserted the execution of the Will in her written statement. Even in her plaint in O.S.No.448/1991, Gowramma has asserted the execution of the Will dated 28.11.1990. The Will is duly registered and the attesting witnesses to the said Will have been examined and both the attesting witnesses though have



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turned hostile, the scribe is examined to prove the execution of the Will.

(ii) Even if the attesting witnesses have not supported the case of the appellants on the execution of Will, the Trial Court and First Appellate Court should have attached weightage to the pleadings and the contention of Gowramma - the testator who asserted that she executed the Will in favour of Chandregowda.

25. In support of the contention, learned counsel for the appellants would place reliance on the judgment in ***Pentakota Satyanarayana and Others vs. Pentakota Sita Ratnam and Others***¹ and the judgment in ***Smt. Sarojini and another vs. Yellappa Kempanna***² rendered by the Co-ordinate Bench of this Court. In addition, reliance is also placed on the judgment in ***Ramabai Padmakar Patil and others vs. Rukminibai Vishnu Vekhande and others***³.

¹ 2005 (8) SCC 67

² WP No.102067/2024

³ 2003 (8) SCC 537



26. Learned counsel for the respondents defending the adoption and registered adoption deed dated 06.03.1952 raised the following contentions.

(i) The adoption deed dated 06.03.1952 was duly registered on 27.05.1952.

(ii) Gowramma is also a witness to the said adoption.

(iii) No dispute is raised relating to adoption during the life time of adoptive father Malaligowda.

(iv) Original adoption deed is produced and the document being a 30 year old document, the presumption is in favour of due execution and the appellants have not led any evidence to rebut the presumption.

(v) Both Courts have concurrently held that adoption is duly established and no grounds are made out interfere with the concurrent findings relating to proof of adoption.

27. The Court has considered the contentions on the alleged adoption deed dated 06.03.1952 said to have been registered on 27.05.1952.



**"Discussion on the adoption deed dated
06.03.1952."**

28. Both Courts have concurrently held that the adoption is duly established. Admittedly, the alleged adoption is before the commencement of the Hindu Adoption and Maintenance Act, 1956. Thus, the provisions of the said Act of 1956 are not applicable.

29. The respondents claim that Gowramma has signed the adoption deed as a witness. Gowramma has disputed her signature. Both Courts have appreciated the evidence of PW1 to PW3 to come to the conclusion that the adoption is proved. Both Courts have concluded that '*giving and taking*' ceremony took place when Shettygowda was adopted in 1952 and there was no challenge to the adoption during life time of Malaligowda.

30. Admittedly, the original adoption deed produced in the Court was 30 years old. It carried the presumption that it is signed by Malaligowda. Said presumption, though rebuttable is not rebutted.



31. Trial Court has held that, suit without a prayer for cancellation of adoption deed, is not maintainable. The plaintiff - Gowramma is not the executant of the adoption deed. However, she is said to be a witness to the said document and if her signature/thumb impression is established, it implies her consent for adoption. In such an event, the plaintiff should seek cancellation of adoption.

32. Even if there is no formal declaration sought to cancel the adoption deed, the person asserting adoption is also required to prove the same as the adoption is not admitted in specific terms.

33. The Court has to consider whether there is evidence to hold that the adoption is valid.

34. On considering the reasons assigned by the Trial Court and First Appellate Court, this Court is of the view that both the Courts have rightly held that, the giving and taking ceremony is established and adoption has taken place as per the custom prevailing in their community and no case is made out to interfere with the concurrent findings relating to adoption deed dated 06.03.1952, registered on 27.05.1952. The



presumption as to the thumb impression/signature of Malaligowda certainly is in favour of the respondent. No evidence is led to rebut the presumption. The adoption deed is duly registered. Fact that Malaligowda did not have male issues from both wives also suggests that he might have opted to adopt a male child.

35. Assailing the Will dated 28.11.1990, the learned counsel for the respondents raised the following contention.

(i) Attesting witnesses to the Will have not supported alleged execution of the Will.

(ii) Scribe's evidence led in support of the alleged execution of the Will not sufficient to uphold the execution of the Will, more particularly when the attesting witnesses have not supported the execution of alleged Will.

(iii) The signature/thumb impression of Gowramma - the alleged testator is not proved.

(iv) Gowramma - the alleged testator was aged, illiterate and did not possess sound disposing state of mind at the time of alleged execution of the Will.



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(v) The beneficiary has taken active part in the execution of the alleged Will and the details of the Court proceedings in the Will speak abundantly about the active participation of the beneficiary

(vi) Suspicious circumstances surrounding the Will are not dispelled by the propounder who was also the power of attorney holder of Gowramma and who was prosecuting cases on behalf of Gowramma against the respondent.

(vii) The beneficiary under the Will is a stranger and no reasons are assigned to disinherit the natural heirs.

36. This Court has considered the contentions and perused the records.

"Discussion on the Will dated 28.11.1990."

36.1 Certain facts are admitted. Gowramma did not have any issue from the marriage. The Will dated 28.11.1990 is registered. Gowramma died on 31.12.1992.

36.2 During the life time of Gowramma, respondents along with family members filed the suit, in O.S.No.136/1992



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challenging the Will dated 28.11.1990 said to have been executed by Gowramma.

37. Following relevant facts are borne out from the records.

37.1 Gowramma in her plaint in O.S.No.448/1991 has averred that she has executed a Will on 28.11.1990 in favour of Chandregowda and said Will is registered.

37.2 In the written statement filed in O.S.No.136/1992, where the plaintiff in O.S.No.136/1992, disputed the alleged execution of Will dated 28.11.1990. Gowramma/defendant No.1, did not dispute the execution of Will dated 28.11.1990 but asserted the execution of Will dated 28.11.1990 in favour of Chandregowda - defendant No.2 in the said suit.

37.3 Gowramma was not alive when the aforementioned suits went for trial.

37.4 Attesting witnesses to the alleged Will dated 28.11.1990 have not supported the execution of the Will in their chief examination and have been treated as hostile and have admitted their signatures on the Will dated 28.11.1990.



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38. Learned counsel for the respondents in first place urged that there is concurrent finding that the Will dated 28.11.1990 is not proved and there is no scope to interfere with the concurrent findings on the alleged Will dated 28.11.1990.

39. The Trial Court has disbelieved the Will mainly on the following reasons:

(a) Gowamma died during the pendency of O.S.No.448/1991 and Chandregowda came on record as testamentary heir of Gowamma and there is no independent pleading by Chandregowda to claim right over the properties based on the Will of Gowamma and evidence on the Will without pleading cannot be looked into.

(b) Gowamma has not established ownership over the properties

(c) Attesting witnesses have not supported the contention relating to proof of the Will

40. First Appellate Court confirmed the finding on the following reasons.



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(a) Gowamma was not the absolute owner of the properties and thus could not have executed the Will

(b) Gowamma in her plaint in O.S.No.448/1991 has not stated to whom she handed over the Will after alleged execution.

(c) Legatee/appellant has not stated that when and how PW2 - his brother came in custody of the Will.

(d) It is not stated that who accompanied Gowamma to the office of the sub-registrar when she was aged around 75 years.

(e) Respondent - DW1 stated that Gowamma lived along with him. Thus, the Will in favour of appellant by Gowamma disinheriting respondent is highly suspicious.

41. As far as the contention that the concurrent finding relating to proof of Will cannot be disturbed in an appeal under Section 100 of the Code of Civil Procedure, is concerned, suffice to say that it cannot be applied like a thumb rule. It is equally settled that concurrent finding of facts, contrary to the evidence on record and without noticing/reference to acceptable evidence or applicable provision of law, can be interfered in



exercise of jurisdiction under Section 100 of the Code of Civil Procedure.

42. The Trial Court as already noticed held that there is no independent pleading by the appellants on the execution of Will. This observation is erroneous. In O.S.No.117/1994, Chandregowda is the defendant and his defence is based on the Will dated 28.11.1990 as can be seen from paragraph No.8 of the written statement.

43. Moreover, the issue is framed based on the said Will in all three suits namely, O.S.No.448/1991, O.S.No.136/1992 and O.S.No.117/1994 and both sides have led evidence on the issue.

44. Thus, the finding that the propounder has led evidence on the Will without pleading is untenable.

45. The finding that Gowamma is not the absolute owner of the property cannot be faulted. However, the finding that Gowamma not being the owner cannot execute the Will is erroneous. If Gowamma is not the absolute owner, and if she is found to be joint owner, the Will though executed for entire



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property, if otherwise proved to be valid, will operate to the extent of the share held by the testator. Both Courts erred in holding that Gowramma cannot execute the Will on the premise that she is not the absolute owner.

46. First Appellate Court has held that the plaint in O.S.No.448/1991 filed by Gowramma does not contain a recital that Gowramma handed over the Will to legatee of PW2. That is not the requirement of law.

47. This is a peculiar case, where the testator Gowramma in her life time files a suit against a person who claimed to be the adopted son of her husband. In the suit, Gowramma challenged adoption and asserted execution of the Will in favour of husband's relative.

48. In another suit (O.S.No.136/1992), Gowramma's Will is questioned on the premise that she has no right to execute the Will. Said suit is filed against Gowramma and her legatee. Gowramma in her written statement asserts the execution of Will dated 28.11.1990.



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49. Gowamma during her lifetime never denied the execution of the Will. Thus, the contention relating to valid execution of the alleged Will dated 28.11.1990 or otherwise has to be addressed keeping in mind the pleading of Gowamma.

50. Unfortunately both Courts have not analysed the effect of Gowamma's pleading in O.S.No.448/1991 and O.S.No.136/1992.

51. In the light of the peculiar facts of the case, more so in a situation where the Will is registered, the contention urged by the respondents as to who handed over the Will to the propounder, or why no pleading in the plaint as to what Gowamma did after executing Will, may not have much significance.

52. Since the finding on the Will dated 28.11.1990 is recorded without analysing the testator's pleading and also not noticing the position of law, that even the joint owner can execute the Will to the extent of undivided share, the Court has to consider whether the evidence on record is sufficient to uphold the execution of the Will dated 28.11.1990 and whether both Courts erred in not considering the testator's pleading



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relating to the Will in question. This is precisely one of the substantial questions of law in RSA No.1773/2013.

53. As already noticed, alleged Will dated 28.11.1990 is registered. The signature of Gowramma does not appear to be in dispute. In paragraph No.18 of the cross examination of PW.1, it is suggested that Gowramma's signature obtained (on a document) on account of her old age is misused as a Will. Even in paragraph No.3 of the cross examination of PW3 (scribe), it is suggested that Gowramma's signature is taken on Ex.P.32 - the Will without informing Gowramma that it is a Will. In paragraph No.5 of the cross examination, it is suggested to PW-3 - the scribe, that Gowramma has not signed in the presence of the scribe. To the same witness in paragraph No.6, it is suggested that on ExP32 - Will, Gowramma's thumb impression is taken without informing her about the contents of the document.

54. In the cross examination, DW1 - respondent has disputed the thumb impression of Gowramma on the Will. It is also noticed that he has disputed Gowramma's thumb impression in her pleading and vakalat though it is not his case



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that Gowramma has not signed the pleadings (Plaint in O.S.No.448/1991 and written statement in O.S.No.136/1992) and vakalat.

55. On considering overall materials placed on record, it appears that Gowramma's signature/thumb impression on the Will is not in dispute. What is disputed is act of Gowramma putting her thumb impression in the presence of the scribe. These aspects are completely ignored by the Trial Court and First Appellate Court.

56. The law mandates that to prove the execution of the Will, the propounder must examine at least one attesting witness on attestation.

57. Appellants examined both attesting witnesses who were before the Court pursuant to the warrant issued by the Court. Both witnesses have not supported the propounder. Both witnesses pleaded ignorance about the Will and are treated as hostile and were cross examined by the propounder. In the cross-examination, both admitted their respective signature on the disputed Will.



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58. The witnesses though have categorically stated that they have not witnessed the execution of Will by Gowramma, have admitted their signatures on the Will. Why the said witnesses have signed the Will is not satisfactorily explained by them.

59. However, to prove the attestation, the scribe is examined. The scribe has deposed that the testator signed in the presence of witnesses and in his presence. The scribe has also deposed that witnesses signed the Will in his presence and the presence of the testator. Scribe further stated that he signed in the presence of testator and attesting witnesses.

60. From the evidence placed on record, it can be concluded that the alleged Will dated 28.11.1990 is duly registered. It bears the signatures/thumb impressions of Gowramma, two persons alleged to be the witnesses to the said Will, and also the signature of the scribe.

61. The question is whether evidence on record is sufficient to hold that attesting witnesses have turned hostile and have deposed contrary to attestation made by them, as alleged by the propounder.



62. Sections 70 and 71 of the Indian Evidence Act, 1872, are relevant in the context of the case.

"70. Admission of execution by party to attested document.—*The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.*

71. Proof when attesting witness denies the execution.—*If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."*

63. Section 70 provides that if the executant admits execution of a compulsorily attestable document, then it is sufficient proof of execution as against the party admitting it.

64. Section 71 provides that in case, the attesting witness do not support attestation and do not recollect execution of a document, the document can be proved by other evidence.

65. Thus, even if the attesting witnesses do not support the case of the propounder of the Will, it can be proved by other evidence.



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66. So far as execution of Will dated 28.11.1990, the testator Gowramma has admitted the execution in her pleading in O.S.No.448/1991 and O.S.No.136/1992. Thus, the said admission binds Gowramma. Since this Court has held that adoption of Shettygowda is valid, the respondents can claim right over the portion of the suit property only through Gowramma. Thus, respondents cannot take a stand contrary to the stand of Gowramma. The respondents have not placed any materials to hold that Gowramma, signed the plaint in O.S.No.448/1991 and written statement in O.S.No.136/1992 without being unaware of it. In fact, this is not the contention raised in the pleading. Thus, Gowramma's statement or admission or assertion relating to execution of the Will does bind the respondents.

67. Assuming that Gowramma's admission does not bind the respondents, under Section 71 of the Indian Evidence Act, 1872, the Will can be proved even if the attesting witnesses do not support the attestation. However, there must be evidence to prove such execution.



68. In the instant case, the scribe has proved attestation of the Will dated 28.11.1990. The reason he states is that he has witnessed the testator signing the Will in the presence of attesting witnesses and the attesting witnesses have signed the Will in the presence of the testator. The Court does not find any reason to disbelieve the evidence of the scribe relating to attestation and proof of the Will.

69. Following circumstances according to the Court strongly point towards the execution of the Will dated 28.11.1990.

- (a) Gowamma - the testator in her pleadings (plaint in O.S.No.448/1991 and written statement in O.S.No.136/1992) has asserted the execution of the Will dated 28.11.1990.
- (b) Gowamma's relationship with the respondents was strained and it is established from the fact that both prosecuted various proceedings against each other since 1990. If Gowamma died intestate, her estate would devolve on the respondents. Thus, Gowamma had a reason to execute the Will.



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- (c) Thumb impressions of Gowamma on the Will dated 28.11.1990 are established.
- (d) Gowamma lived almost two years after the execution and registration of the Will dated 28.11.1990 and it speaks about reasonably good health of Gowamma at the time of execution of the Will. This is more so when there is no other acceptable evidence to hold that Gowamma did not possess sound state of disposing mind.
- (e) Attesting witnesses who have denied the attestation of the Will dated 28.11.1990 in the cross-examination have admitted their signatures on the said Will dated 28.11.1990. One of the attesting witnesses has not offered any explanation as to why he has signed the document dated 28.11.1990 and another attesting witness tried to explain the signature on the Will stating that his signature is taken on the assurance that he will be allotted a site by the propounder. Attesting witnesses appear to be untrustworthy. Considering the fact that the testator herself has admitted the execution of the Will in



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two readings namely; the plaint in O.S.No.448/1991 and O.S.No.136/1992, this Court has to hold that evidence who has testified about the execution of the Will is more credible.

70. This being the position, the Court has to come to the conclusion that the propounder has proved the Will keeping in mind Sections 70 and 71 of Indian Evidence Act, 1872.

71. Learned counsel for the respondents has relied on the judgment of the Hon'ble Apex Court in ***Randhir Kaur vs. Prithvi Pal Singh & Others***⁴ to contend that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact. In the aforementioned judgment, the High Court has observed as under:

"As the two courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding.

To the same fact, in another decision of this Court in the case of R. Ramachandran Ayyar vs. Ramalingam Chettiar, (AIR 1963 SC 302; 1963 (3) SCR 604) where the Court observed as follows:-

⁴ Civil Appeal No.5822/2019



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"But the High Court cannot interfere with the conclusions of the fact recorded by the Lower Appellate Court, however, erroneous the said conclusions may appear to be to the High Court, because, as the privy council has observed, however, gross or inexcusable the error may seem to be, there is no justification under Section 100 to correct that error."

72. It is to be noticed that if the judgment is delivered by referring to the evidence and both Courts concurrently take a view while interpreting the evidence on record, then the Court may not have the jurisdiction under Section 100 of the Code of Civil Procedure to interfere with the said finding.

73. If the finding on fact is without reference to the evidence or provision of law or the binding precedent, then said omission to notice and analyse the relevant evidence or provision of law is a substantial question of law within the meaning of Section 100 of Code of Civil Procedure and the Court has the jurisdiction to reverse the concurrent finding.

74. As already noticed, the effect of pleading in O.S.No.448/1991 where the testator herself pleaded and asserted the execution of Will dated 28.11.1990 and the pleading in O.S.No.136/1992 where the testator defended the



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challenge to the said Will dated 28.11.1990 are two vital documents which have been completely ignored by the Trial Court. Effect of said pleadings is not analysed with reference to Section 70 of the Indian Evidence Act, 1872.

75. In addition, the admission of the thumb impression of the testator on the Will is also not taken into consideration by the Trial Court and First Appellate Court.

76. Learned counsel for the respondents has also relied on the judgments of the Hon'ble Apex Court in ***S.R. Srinivasa and Others vs. S. Padmavathamma***⁵ and ***H. Venkatachala Iyengar vs. B.N. Timmajamma and Others***⁶, to contend that burden is heavy on the propounder to prove the execution of the Will and to dispel the suspicious circumstances.

77. In the judgment of the ***S.R. Srinivasa and Others*** supra, the Apex Court has also held that the scribe cannot be an attesting witness unless he has put the signature with an intention to attest. This Court has considered the contentions with reference to the judgments cited above.

⁵ *Civil Appeal No.4623/2005*

⁶ *AIR 1959 SC 443*



78. As already noticed, this case stands on a different footing given the fact that the testator herself has asserted the execution of the Will dated 28.11.1990 in her pleadings in O.S.No.448/1991 and O.S.No.138/1992. This being the position, the degree of proof that is required to prove the execution of the Will reduced to a larger extent.

79. The evidence of the scribe if not treated as the evidence of an attesting witness can certainly be used to uphold the contention that two attesting witnesses named in the Will indeed attested the Will though they did not speak about attestation when they were brought before the Court pursuant to the warrant issued by the Court. This Court has already discussed reasons as to why the attesting witnesses denying the attestation.

80. At this juncture it is relevant to notice the ratio in ***Savithri and Others vs. Karthyayani Amma***⁷ where the Hon'ble Apex Court has held that the scribe can prove the attestation if he has seen the testator and attesting witnesses signing the Will in his presence.

⁷ (2007) 11 SCC 621



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81. Learned counsel for the respondents urged that the testator's claim in the Will that she is the absolute owner of the properties covered under the Will is erroneous, and details of all proceedings in Court referred to in the Will are the suspicious circumstance. It is to be noticed that the testator filed a suit disputing adoption. Thus, testator's claim that she is the absolute owner of the property is in line with her claim in the suit. If ultimately in the suit (after the execution of the Will), it is found that the said claim relating to absolute ownership is incorrect, same does not invalidate the Will as long as testator owns any part of the property covered under the Will.

82. Likewise, meticulous details in the Will relating to various Court proceedings cannot be said to be unnatural merely because the testator is illiterate. On account of testator's illiteracy, someone, may be even the beneficiary might have assisted the testator in narrating the facts or giving instructions to the scribe. That by itself will not make the Will suspicious. May be those aspects need to be explained by the propounder. Since testator has asserted about the execution of



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Will dated 28.11.1990 in her pleadings, the degree of proof has reduced to a great extent and that being the case, even if the beneficiary has provided instructions about various proceedings, in the facts of the present case will not render the Will invalid.

83. For the reasons already recorded above, this Court is of the view that impugned judgments and decrees passed by the Trial Court and First Appellate Court to the extent of holding that the Will dated 28.11.1990 is not proved have to be set-aside and accordingly set-aside.

84. It is also noticed from the genealogy furnished by the parties to the proceeding that the propositus had a daughter by name Giddamma from his first wife Dyavamma. It is stated that both Dyavamma and Giddamma are no more. There is no positive statement that Giddamma died before marriage or that she died issueless. The respondents have not raised a contention that the suit is bad for non joinder of heirs of Giddamma. In the suit filed by legal representatives of Shettygowda also, there is no reference to Giddamma.



85. In the aforementioned circumstances, this Court would assume that Giddamma died intestate and issueless. Thus the properties of Malaligowda would devolve on Gowramma and children of Shettygowda. Since suit in O.S.No.136/1992 is filed by all the legal representatives of Shettygowda, this Court instead of driving the parties to one more suit for partition and separate possession, would mould the relief for partition and separate possession.

86. Chandregowda will have $\frac{1}{2}$ share in the suit properties and plaintiffs No.1 to 5 in O.S.No.136/1992 will have $\frac{1}{2}$ share in the suit properties described in O.S.No.136/1992.

87. Hence the following:

ORDER

- (i) The appeals are ***allowed in part.***
- (ii) Judgment and decrees in R.A.No.6/2008, R.A.No.7/2008 and R.A.No.8/2008 dated 01.08.2013 on the file of Principal Senior Civil Judge, Hassan are set-aside in part.
- (iii) Judgment and decrees dated 28.11.2007 in O.S.No.448/1991, O.S.No.136/1992 and



O.S.No.117/1994 by II Additional Civil Judge, Junior Division, Hassan are set-aside in part.

- (iv) The Will dated 28.11.1990 executed by Gowamma is declared as valid to the extent of $\frac{1}{2}$ share in the suit properties.
- (v) Shettygowda is declared as adopted son of Malaligowda under the registered adoption deed dated 06.03.1952.
- (vi) Since the suit in O.S.No.136/1992 on the file of the Civil Judge (Junior Division), Hassan covers all the parties having right over the suit schedule properties, the relief is moulded and decree for partition and separate possession is passed as under:
 - (a) Chandregowda son of Puttegowda - the plaintiff in O.S.No.448/1991 is entitled to $\frac{1}{2}$ share of Gowamma in the suit schedule properties.
 - (b) The plaintiffs in O.S.No.136/1992 (represented by legal representatives of deceased plaintiff, if any) are entitled to $\frac{1}{2}$ share in the suit properties.
 - (c) Since there are only two branches, one of the branches, (either the appellants or respondents) shall be given the option to



propose the division, and the other branch shall have first option to choose the properties so proposed to be divided. If division takes place as aforesaid, the officer from the Revenue Department be directed to prepare the sketch and fix the boundaries of the properties so divided.

- (d) If the parties do not agree on the procedure contemplated in paragraph (c), the Court Commissioner shall be appointed to effect the division of the properties.
- (e) After the division of the properties, the Final Decree Court shall issue necessary direction to change the property records to the jurisdictional Deputy Commissioner as contemplated in Section 132(3) of the Karnataka Land Revenue Act.
- (f) The suit schedule properties referred to in the operative portion are the properties described in O.S.No.136/1992 on the file of II Additional Civil Judge (Junior Division), Hassan.
- (g) Since both parties before the Trial Court in their respective suits asserted exclusive possession over the suit schedule properties, no order is passed on *mesne* profits.



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- (h) In case either the appellants or the respondents intend to give up claim relating to exclusive possession and seek *mesne* profits, are entitled to claim *mesne* profits from the date of initiation of Final Decree Proceeding till the date of actual delivery of the possession of the properties.
- (i) It is made clear that adjudication relating to *mesne* profits if any, required in a situation referred to in Clause (h), the enquiry/ adjudication relating to *mesne* profit from the date of initiation of Final Decree Proceeding till the date of delivery of possession shall take place only after possession of the properties are delivered to the respective sharers.

Sd/-
(ANANT RAMANATH HEGDE)
JUDGE

GVP
CT:VN
LIST NO.: 19 SL NO.: 1