NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7548 OF 2002

Dayanandi … Appellant

Versus

Rukma D. Suvarna and others … Respondents

J U D G M E N T

G.S. Singhvi, J.

1. This appeal is directed against the judgment of the learned Single Judge of the Karnataka High Court whereby he allowed the appeal filed by respondent No.1, reversed the judgment and decree passed by Ist Additional Civil Judge, Mangalore (hereinafter referred to as, 'the trial Court') and decreed the suit filed by her for partition and separate possession of her share in the suit property.

2. The suit property was owned by Singa Gujaran, father of respondent No.1, appellant and respondent Nos. 2 to 6. About 3 months and 10 days before his death, Singa Gujaran executed Will dated 25.5.1987. He bequeathed the property specified in item No.1 of the Schedule attached to the Will to one of his four daughters, namely, Kalyani (respondent No.3) and the property specified in item No.2 jointly to the other daughters, namely, Dayanandi (appellant), Rukma (respondent No.1) and Deena (respondent No.2).

3. After one year of the demise of Singa Gujaran, respondent No.1 filed suit for partition and separate possession of her share in plaint Schedule 'B' property. She pleaded that her father had executed Will dated 25.5.1987 and bequeathed plaint Schedule `A' property to respondent No.3 Kalyani and plaint Schedule `B' property to other daughters but by taking advantage of the acute illness of the father, the appellant and respondent No.2 manipulated the execution of another Will depriving her of share in the property.

4. In the written statement jointly filed by them, appellant and respondent No.2 did not deny the execution of Will dated 25.5.1987 by Singa Gujaran but they questioned the genuineness and validity of the Will

relied upon by respondent No.1 and pleaded that after executing the Will, the deceased had made alterations and thereby disinherited respondent No.1. They further pleaded that Singa Gujaran executed another Will dated 25.8.1987, in which respondent No.1 was not given any share because she did not attend funeral of the mother and even when the testator visited Bombay in May, 1987, she did not come to meet him. According to the appellant and respondent No.2, at the time of execution of the second Will Singa Gujaran was in a sound state of mind and he consciously denied any share in the property to respondent No.1. They claimed that respondent No.1 has filed suit for partition and possession of her alleged share in the suit property by taking advantage of the testator's subsequent illness and his inability to speak or move about.

5. On the pleadings of the parties, the trial Court framed the following issues:

> "1. Whether the suit is bad for non-joinder of necessary parties? (deleted)
>
> 2. Whether the plaintiff proves that Late Singa Gujaran executed a Will dated 25.8.1987 and whether it was the last and effective Will of the Late Singa Gujaran?
>
> 3. Whether defendants No. 1 and 2 prove that their father Late Singa Gujaran executed the Will dated 25.8.1987 and whether it is the last and effective Will of Singa Gujaran?

4. Whether defendants No.1 and 2 prove the Panchayat alleged in para 9 of the written statement and whether the plaintiff accepted the jewellery? (deleted)

5. Whether the defendants 1 and 2 also prove that rents are being collected by Amarnath and spending for maintenance of property, payment of tax and to look after Ravindra who is congenitally mentally retarded and is dumb?

6. Whether the plaintiff is entitled to claim a share in the rental income of buildings situated in plaint "B" scheduled property?

7. Whether the plaintiff is entitled to partition and separate possession of 1/3rd share in plaint `B' scheduled properties as claimed?

8. To what reliefs are the parties entitled."

6. In support of her case, respondent No.1 examined herself and 5 other witnesses including PW-5 Dr. J. Subba Rao and produced 11 documents which were marked as Exhibits P.1 to P.11. She also got produced original Will dated 25.5.1987 (Exhibit P.1) from the appellant. The appellant examined herself as DW-1 and produced the second Will which was marked as Exhibit D.1.

7. After analyzing the pleadings of the parties and the evidence produced by them, the trial Court held that execution of Will dated 25.5.1987 is proved but observed that by virtue of the alterations made in that Will, the

deceased has consciously disinherited respondent No.1. The trial Court noted that the names of four persons were mentioned in Exhibit P.1 in respect of the second item of the Schedule but the name of respondent No.1 Rukma was deleted and total number of the beneficiaries was also changed. The trial Court referred to the statement of respondent No.1 that her father had shown Exhibit P.1 without any correction as also the alleged admission made by her in response to a question put in the cross-examination and observed:

> "16. PW-1 in the chief-examination, appearing on page No.3 states that her father had shown Ex.P.1 to her and when she had seen there was no insertion or correction noted in Ex.P.1, but she has not stated that the correction or deletion was made by defendant No.1. In the cross examination, appearing at page 7, PW-1 specifically admits that the documents writer before completing the document will mention the corrections made in the document. She states that she did not notice the corrections made in Ex.P.1. She admits that her father Singa Gujaran affixed LTM on Ex.P.1. Further admission of PW-1 appearing in the form of question and answer on the face depict that the said corrections and deletions appearing in Ex.P.1 was made before the contents were read over to Singa Gujaran. In this regard, I am inspired to extract the testimony of PW-1 appearing in the form of question and answer made not in her cross examination, which reads thus:
>
> Question: Is it not that the striking off and the correction at the end of the document made at the time of preparation of the document by the scribe?
>
> Answer: Striking off and the correction were written at the time when the document was read over to my father.

> (True and correct English Translation of Kannada Portion).
> Thus the answer given by PW-1 appearing in the cross-examination itself suffice to conclude that the corrections made in Ex.P.1 were within the knowledge of Singa Gujaran and when the scribe read over the contents of Ex.P.1, those corrections were found in Ex.P1. In this regard the testimony of PW-5 may be recollected, who in the chief-examination itself has deposed that the contents of Ex.p1 were read over by the scribe to Singa Gujaran, who admitted the same and affixed his LTM. This shows that, after the name of plaintiff 'Rukma' was deleted and the corrections were made, so as to bequeath to 3 persons instead of 4 persons, Singa Guajan by understanding that the name of Rukma was deleted and the 'B' schedule property was to be bequeathed only to defendants 1 to 3, affixed his LTM. After giving answer as extracted supra, PW-1 realised and further deposed that she gave such answer in confusion, but there was no such confusion as a clear cut question was put to her and she gave a very clean answer and the same has been recorded."

The trial Court also discarded the testimony of PW-5 by making the following observations:

> "The plaintiff examined PW-5 to prove Ex.P.1 and also to convince the court that the corrections made in Ex.P.1 deleting the name of the plaintiff as after thought by defendant No.1, whereas the said correction was not found when Singa Gujaran affixed his LTM, but in this regard the plaintiff failed to convince that fact, because PW-5 not supported to that extent. When Ex.P.1 was confronted to PW-5, he has deposed that the contents of the same were read over to Singa Gujaran by the scribe, who admitted the contents and then affixed his LTM. This witness states that he also read over the contents of Ex.P.1 and states thus:
>
> 'After having read this, what stated in Ex.P.1 now was in fact written.

> Question:-1 Whether in Ex.P.1 on the first page the word, 'nalvarige' was struck off and the word 'moovarige' was written in pen at that time?
>
> Ans:- I do not know about it.
>
> Question:-2 Whether in the second page the word, 'Rukma' was struck off and on top of it '3' as written in pen and in the next line the word, 'nalvaru' was struck off and the word, 'moovaru' was written in pen at that time?
>
> Ans:- I do not know about it also.
>
> (True and correct English translation of Kannada portion).
>
> Thus, the testimony of PW-5 goes against the assertion of the plaintiff, because PW-5, who is a doctor and who was treating Singa Gujaran has clearly deposed that whatever the contents appear now in Ex.P.1, were very much present when Singa Gujaran executed it, thereby he has ruled out the possibility of any corrections or alterations made after execution of it by Singa Gujaran. He has not deposed that the corrections noted in Ex.P.1, were not present at the time of execution by Singa Gujaran, but to the questions put to him as extracted above, he has shown ignorance, but his first part referred supra, unequivocally depict that the contents of Ex.P.1 which are now existing, including the corrections and alterations, were available at the time of execution by Singa Gujaran."

The trial Court finally held that respondent No.1 was not entitled to any share in the suit property and accordingly dismissed the suit.

8. In the appeal filed by respondent No.1, the High Court framed the following points:

> "1) Whether the alternation/deletion of the plaintiff's name in the first Will Ext.P.1 was done prior to its execution by the executant or not?
>
> 2) Whether the finding of the court below that the second Will Ext.D-1 is proved, is justified or not?"

9. The High Court first considered the issue whether corrections/alterations made in Exhibit P.1 existed when the testator appended his thumb impression, referred to the evidence produced by the parties, noticed Section 71 of the Indian Succession Act, 1925 (for short, 'the Act') and observed:

> "A bare perusal of the original of Ext.P.1 discloses the first alteration is found at page No.1 in the last second and third line, where the name of Rukkamma has been struck off and subsequently in place 'to four persons' is struck off and the word 'to three persons' is inserted in page No.2 and in third line the word Rukkamma is deleted and in the fourth line 'to four persons' is struck off and 'to three persons' has been inserted. As required under Section 71 of the Indian Succession Act, 1925 no signature of the testator is made in the margin or at some other part of the Will or near to such alteration or at the foot or end or opposite to a memorandum referring to such alteration. Therefore, when such alteration has not been made in the manner indicated under Section 71 such alterations will not have any effect. Secondly, as to the question whether said alterations were made prior to the execution of the Will or subsequent to the execution of the Will there is absolutely no evidence adduced by either of the parties. However, an attempt is made on the part of the respondents counsel to point out the evidence of PW-1 wherein she has stated that the said corrections are made at the time when it was read over to her father whereby meaning that after alterations were made it was

> read over to the executant and he affixed his LTM in token of such alterations also. It is this admission which has been taken note of by the court below to hold that the said alterations were there before execution and therefore, the Will has to be executed with the said alterations. It is nobody's case that PW-1 was present at the time of the execution of Ext.P.1 In fact, realising the mistake committed by her an attempt is made subsequently to explain it. But it is clear that her admission has no legal basis as she was not present at the time Ex.P1 was executed. If the evidence is excluded from record, there is no other evidence placed on record by the defendant to demonstrate that the said alteration was made prior to the execution of the Will. In fact, the doctor, attesting witness PW-5 is unable to answer a pointed question whether such alterations were there when the Will was executed and when he attested the Will. In the aforesaid circumstances, no importance could be given to the so called admission of the plaintiff to hold that the said alterations were there before executing the Will……."
>
> (emphasis supplied)

10. The High Court then considered the question whether Singa Gujaran had voluntarily executed the second Will (Ext. D1), analysed the evidence produced by the parties including statements of the doctors examined by respondent No.1 and answered the same in negative. The High Court also dealt with the reasons put forward by the appellant and respondent No.2 to justify the alleged decision of Singa Gujaran to disinherit respondent No.1 and observed:

> "On the face of it the said reason given for disinheriting the plaintiff do not appear to be genuine. The mother of the plaintiff died in the year 1985. If his father was upset

because she did not attend the funeral in 1985, in 1987 when he was making the will he would not have given a share in the B-schedule property to the plaintiff under Ex.P.1 and that cannot be made a ground to disinherit the plaintiff in the second will when under the first will a specific share has been given to the plaintiff. In between the first will and second will hardly the gap is three months. The case advanced by the defendant is after making the first will his father went to Bombay to the second defendant's house and the plaintiff did not visit him. Absolutely no material is placed before court to substantiate the said case. The said case is highly impossible because the material on record disclose that on 11th of August 1987 his father was admitted to Tara Clinic which fact was totally denied by the defendant in her reply notice. It is to demonstrate the said fact the plaintiff has examined three doctors as witnesses. Their evidence has remained unchallenged and ultimately the defendant also admits that the father was admitted to Tara Nursing Home. The evidence on record disclose that on 11th of August 1987 when the father was admitted in the hospital after examination when it was found that he was suffering from stomach cancer probably as it was at advanced stage the doctor advised the parties to take him back to the house as no useful purpose would be served by keeping him in the clinic. Therefore, after examination he was brought back to the house and no treatment was given. The evidence of his grandson PW-6 who is son of third defendant gives an indication of his state of health. At the time of attesting the testator was in the nursing home. He states that on 11th of August 1987 he was admitted to the nursing home and on 13th he was discharged. The doctors informed them that the deceased is at the advanced stage of cancer and they cannot give any treatment. Therefore, three persons lifted him to the car and brought him back to the house. When he was brought to the house from the hospital he was in unconscious state and he was not taking any food. Dr. Subbarao was visiting the house. After he was taken to Tara Clinic he was not in a position to walk. In fact, the said witness and his mother was staying next doors to the house where Singa Gujaran

> was staying. In the cross-examination of DW-1 she admits that her relationship with her mother was cordial. Under these circumstances, the materials on record disclose that at the time Ext. D-1 was alleged to have been executed by the executant he was suffering from stomach cancer and his health was not in good state. It is 14 days after his admission to the nursing home the said will has come into existence. Fourteen days thereafter he has died. It cannot be said that under these circumstances he was in a sound state of disposing state of mind to execute Ext.D-1."

11. We have heard learned counsel for the parties and perused the record. We shall first consider the question whether the hand written endorsement made at the end of the typed Will (Exhibit P.1) was made at the instance of the testator before he affixed his left thumb mark and whether the High Court committed an error by reversing the finding recorded by the trial Court on this issue.

12. Sections 63 and 71 of the Act which have bearing on the decision of the first question read as under:

> "**63. Execution of unprivileged Wills.–** Every testator, not being a soldier 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 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.

(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 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.

71. Effect of obliteration, interlineation or alteration in unprivileged Will. – No obliteration, interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect, except so far as the words or meaning of the Will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the Will:

Provided that the Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

13. An analysis of Section 63 shows that the testator must sign or affix his mark on the Will or the same shall be signed by some other person as per his direction and in his presence. The signature or mark of the testator or the signature of the person signing for him shall be placed in a manner which

may convey the intention of the testator to give effect to the writing as a Will, which is also required to be attested by two or more persons, each of whom must have seen the testator sign or affix his mark on the Will or some other person sign the Will in the presence or as per the direction of the testator. If the witness has received a personal acknowledgment from the testator of his signature or mark or the signature of other person signing on his behalf, then it is not necessary that both the witnesses shall simultaneously remain present. The section also lays down that no particular form of attestation is necessary.

14. The plain language of Section 71 makes it clear that any alteration made in an unprivileged Will after its execution has no effect unless such alteration has been executed in the same manner in which the Will is executed. The proviso to this section carves out an exception and lays down that such alterations shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alterations or at the foot or end or opposite to a memorandum referring to such alterations and written at the end or some part of the Will.

15. A careful scrutiny of the pleadings of the parties and the evidence produced by them shows that Will Exhibit P.1 was scribed by Narsappayya and was witnessed by PW-5 Dr. J. Subba Rao and B.V. Amin. Respondent No.1 was not present at the time Exhibit P.1 was scribed and executed by Singa Gujaran by putting his left thumb mark. In his testimony, PW-5 stated that the contents of Exhibit P.1 were read over to Singa Gujaran by Narsappayya and he understood the same. PW-5 expressed ignorance about the corrections/alterations made in the Will i.e. scoring out of the word 'four' and writing of word 'three' as also scoring out the name of respondent No.1 Rukma. He then stated that Singa Gujaran was suffering from stomach cancer and when he sent the patient to Dr. Prabhakar in July/mid-August, he was finding it difficult to eat. Later, Dr. Prabhakar referred the patient to Dr. Ballal who confirmed that he was suffering from stomach cancer.

16. We have gone through Exhibit P.1, which was got produced by respondent No.1 from the appellant. Four corrections have been made on pages 1 and 2 of this document. The figures written in letters (four) were substituted with numbers (3) and the name of respondent No.1 was scored out (page 2). At the end of the Will, the testator appended his left thumb mark. On the right side of thumb mark a line has been written with the ink pen/ball pen suggesting that the corrections/alterations were made prior to

putting of left thumb mark by the testator. However, the space between the last line of the typed Will (in Kannada) and what was written with the ink pen/ball pen leaves no manner of doubt that the writing on the right side of the thumb mark was made after execution of the Will. If the corrections/alterations had been made before the testator had appended his left thumb mark, there was no reason why the line showing deletion of the name of respondent No.1 and corrections in the figures were not reflected in the typed Will and why the line was inserted in the little space left between the concluding portion of the Will and the space where the left thumb mark was put by the testator. Therefore, we approve the view taken by the High Court that the corrections/alterations made in Exhibit P1 cannot be said to have been duly attested by the testator as per the requirement of Section 71 of the Act and respondent No.1 is entitled to share in the property specified in Schedule `B' appended to the plaint.

17. The next question which merits consideration is whether Exhibit D.1 was duly executed by Singa Gujaran and, therefore, the first Will will be deemed to have become redundant. Admittedly, Ext. D1 was propounded by the appellant and respondent No.2 and was contested by respondent No.1, who specifically pleaded that by taking advantage of the ill health of the father, the appellant and respondent No.2 conspired and manipulated

execution of the second Will purporting to disinherit her. According to respondent No.1, at the time of execution of the second Will, Singa Gujaran was seriously ill and was not in a sound state of mind so as to understand the implications and consequences of his actions. In support of this assertion, respondent No.1 examined Dr. B.R. Kamath (PW-2), Dr. Prabhakar Rao (PW-3) and Dr. C.R. Ballal (PW-4) apart from PW-5 Dr. J. Subba Rao. All of them categorically stated that Singa Gujaran was suffering from acute stomach cancer and he was not in a position to eat. The statement of PW-6 is also significant on the issue of health of the executant. This witness gave out that the executant was taken to the car by three persons and they brought him back to the house in an unconscious state of mind and he was not taking any food. PW-6 also gave out that the executant was not in a position to walk. The appellant and respondent No.2 relied upon the testimony of PW-5, who had been examined by respondent No.1 to prove the execution of the Will Exhibit P.1. In his cross examination PW-5 disclosed that as per his knowledge, Singa Gujaran had made two Wills and he was a witness to the second Will as well which, according to him, was also scribed by Narsappayya. According to PW-5, the testator had affixed left thumb mark on Exhibit D.1 and he had signed the Will as a witness in the clinic. What is significant to be noted is that PW-5 did not say that Singa Gujaran had

affixed left thumb mark in his presence and that he had put his signatures as witness in the presence of the testator. As to the state of health of the executant, PW-5 categorically stated that he was suffering from acute stomach cancer and was not in a position to eat or walk. It has come in the evidence of the parties that the executant was admitted in Tara Clinic on 11.8.1987 and when the doctor attending him found that cancer was at an advanced stage, they advised the parties to take him home. It has also come on record that just 14 days after the execution of the second Will, the executant died. Therefore, it is not possible to find any fault with the finding recorded by the High Court that the execution of Exhibit D.1 was highly suspicious.

18. It is also apposite to observe that if Singa Gujaran had consciously decided to disinherit respondent No.1 in the first Will by appending his left thumb mark after corrections/alterations were made and the name of respondent No.1 was deleted, there was no reason for him to execute the second Will. In her evidence, the appellant and respondent No.2 could not offer any tangible explanation as to why it became necessary for her father to execute the second Will after he had already disinherited respondent No.1. This also supports the conclusion that execution of Exhibit D.1 was not a voluntary act of the testator.

19. We may now advert to the two reasons put forth by the appellant and respondent No.2, which did not find favour with the High Court, to substantiate their plea that the testator had consciously disinherited respondent No.1. The first reason was that respondent No.1 did not attend the funeral of her mother and on that count the father was upset. On the face of it, this reason does not sound plausible. It is an admitted position that the mother of the parties died in 1985. If the father was upset with respondent No.1 on the ground that the latter had not come to attend the funeral of the mother, then he would not have given any share to her in item No.2 of the Schedule appended to Ext. P1. However, the fact of the matter is that the testator did give share to respondent No.1 along with two other daughters. It is a different thing that some manipulative alterations were made in Ext. P1 giving an impression that before putting his left thumb mark, the testator had consciously disinherited respondent No.1. The second reason was that respondent No.1 did not come to attend him during his visit to Bombay in May, 1987. In this context, it is important to bear in mind that the appellant and respondent No.2 did not adduce any evidence to prove that the testator had visited Bombay between 25.5.1987 i.e. the date on which the first Will was executed and 11.8.1987 when he was admitted in the nursing home. That apart, it was highly improbable that the testator, who was terminally ill,

would have gone to Bombay for the purpose of treatment. Therefore, the so called failure of respondent No.1 to meet the testator during his visit to Bombay cannot be relied upon as a ground for accepting the version of the appellant and respondent No.1 that he was upset with respondent No.1 and decided to disinherit her by executing Ext. D1.

20. In the result, the appeal is dismissed. The parties are left to bear their own costs.

…..…..…….…..…J.
[G.S. Singhvi]

…..…..……..…..……..J.
[Asok Kumar Ganguly]

New Delhi
October 31, 2011.