(2025) 12 SC CK 0073

Supreme Court

Case No: Civil Appeal No(s). 136 Of 2013

A. Kamala Bai (D) Th:Lrs.Vs B. Kanna Rao (D) Thr. Lrs. — APPELLANT

Vs

RESPONDENT

Date of Decision: Dec. 4, 2025

Acts Referred:

- Code of Civil Procedure, 1908- Section 96, Order 22 Rule 3
- Indian Succession Act, 1925- Section 63(c)
- Evidence Act, 1872- Section 68

Hon'ble Judges: Prashant Kumar Mishra, J; Vipul M. Pancholi, J

Bench: Division Bench

Advocate: Jaikriti S. Jadeja, Juhi Bhargava, Hardik Choudhary, V. N. Raghupathy, L. Narasimha Reddy, V. Sridhar Reddy, Abhijit Sengupta, Rohit Jaiswal

Final Decision: Dismissed

Judgement

1. This appeal is directed against the Judgement and decree rendered by the High Court/First Appellate Court dismissing the appellants appeal which in turn was preferred challenging the judgement and decree of the Trial Court dated 29th March, 1989 in O.S. No. 213 of 1983 by the Court of Subordinate Judge, Nellore.

2. Appellants predecessor in interest-Avanthakar Kamala Bai preferred the suit againt her own son-Ballera Kanna Rao seeking declaration of title in respect of Plaint A Schedule Property, for possession of the same, for recovery of Rs. 22,500/-towards past rent from 1979 to December, 1981 or alternatively as damages for use and occupation of the property, for future rents and for costs. The suit was decreed in part to the effect that he should deliver one portion of his choice out of the four portions of the suit building to the plaintiff. If it is not possible for delivering that portion to the plaintiff immediately in view of the occupation of the same by a tenant, the defendant should intstruct that tenant to atorn the rent to the plaintiff.

However, the plaintiff would be at liberty either to accept the rent from that tenant or to seek his eviction for her personal occupation. Thus, the defendant shall have no right, title, control or possession of that portion with effect from 01.04.1989.

3. As against the above decree of the Trial Court the original plaintiff preferred an appeal under Section 96 CPC, A. S. No. 2466/1989.

4. Considering the nature of the order passed by the High Court while rendering the impugned judgement whereby the appellant is not found to be the successor in interest of the original plaintiff by virtue of the subject Will dated 11.03.1999, we are not dealing with the merits of the suit as the issue arising in this appeal is only to the extent of the appellants authority to continue the appeal upon death of the original plaintiff.

5. During pendency of the Appeal Suit before the High Court, the original plaintiff died on 08.10.2002 consequent to which the present appellant moved an application under Order 22 Rule 3 CPC seeking impleadment by bringing him on record as appellant/substituted plaintiff. This application was registered as A.S.M.P. No. 11895/2004 and has been decided in the impugned order itself.

6. During inquiry as to whether petitioners application for substitution can be allowed or not the High Court directed an inquiry and called for a report from the Trial Court, which was submitted by the Principal Senior Civil Judge, Nellore in its report dated 19.04.2010 stating that the proposed party i.e. the appellant herein referred as second plaintiff in the impugned order has proved the Will (Exhibit A.14) as the genuine Will executed by the First Plaintiff/Original Plaintiff in the suit. In course of enquiry, the Principal Senior Civil Judge, Nellore examined PW-4 (the appellant herein), PW-5 (Shaik Jani Basha) and DW-3 (Parvathi).

7. In the impugned order, the High Court has discussed the evidence of above three witnesses and eventually held that PW-5 (Shaik Jani Basha) being the only attesting witness examnined by the Senior Civil Judge, Nellore, his statement is of utmost importance because if that statement does not inspire confidence or is not read in evidence, the requisites of Section 63 (c) of the Indian Succession Act and Section 68 of the Indian Evidence Act, have not been fulfilled. The High Court concluded that PW-5 in his cross examnination stated that I cannot say who gave instructions for preparting his chief afidavit and he does not know the contents of his chief affidavit. Thus, according to the High Court, his statement cannot be read in evidence because there is no examination-in-chief in his affidavit.

8. Learned counsel for the appellant would submit that even if the examination-in-chief was not recorded under the instructions of the witness, in his cross examination he would narrate the contents of the affidavit and he has also proved the attestation of the Will. Therefore, the entire evidence of this witness ought not to have been ignored by the High Court. It is also submitted that once the Will is found to be proved, the appellant would have the authority to continue the

Appeal Suit and the impugned order deserved to be set aside.

9. Per contra, Mr. L. Narasimha Reddy, Learned Senior Counsel appearing for the respondent would submit that the High Court is entirely justified in holding that evidence of PW-5 cannot be read in evidence.

10. We have heard learned counsel for the parties at length and persued the record.

11. Admittedly, PW-5 is the only witness examined by the Appellant to prove the execution of the Will in terms of the statutory mandate under Section 63 (c) of the Succession Act and 68 of the Indian Evidence Act. Apart from PW-5, the other attesting witness or the scribe has not been examined before the Senior Civil Judge in course of inquiry to submit the report called for by the High Court. Thus, the statement of PW-5 is of great significance for the reason that it is his statement around which the execution of the Will have to be proved. When such is the situation, we have to consider the evidence of this witness with utmost attention. The statement of PW-5 in his cross-examination is reproduced herein for exactitude:

I have not given instruction for preparing the chief affidavit belongs to me. I cannot say who have instructions for preparing my chief affidavit. I do not know the contents of my chief affidavit.

12. In addition to the above statement, in the subsequent part of his cross examination he also states that **I do not know the contents of the will.**

13. Thus, firstly, this witness categorically admits that the chief affidavit was not prepared on his instructions and secondly, he does not know the contents of his chief affidavit. Ms. Jaikriti S. Jadeja, learned counsel for the appellant may be right to some extent in submitting that the entire statement of the witness cannot be ignored. However, the second limb of her submission that in his cross examination this witness has proved the execution of the will is difficult to accept because in subsequent part of his cross examination this witness admits that he does not know the contents of the will. The evidence of a witness has to be read as a whole and not in isolation. On such reading the evidence of PW-5 does not inspire confidence.

14. To prove the execution of will, one of the attesting witnesses is to be examined mandatorily, however, when the sole attesting witness examined before the Court admits that his chief affidavit i.e. the examination in chief was not recorded under his instructions nor does he know the contents of his examination in chief, the evidentiary value of his statement in cross-examination is seriously dented. Even if it is not necessary for a attesting witness to know the contents of the will, the question remains that he has to depose in Court, in no uncertain terms, that he has prepared the chief affidavit under his own instructions so that the credibility of the witness is assessed in the Court as a true attestor as required under Section 63 (c) of the Succession Act and Section 68 of the Indian Evidence Act. If there is slightest doubt about the credibility of the sole attesting witness, holding the will to be a genuine

one would be extremely difficult for the Court.

15. In the above view of the matter we are unable to accept the contention of learned counsel for the appellant that the will dated 11.03.1999 ought to have been found as genuine and the appellant should have been allowed to prosecute the Appeal Suit before the High Court on merits.

16. Accordingly, we do not find any substance in the Civil Appeal which fails and is hereby dismissed.

17. Needless to say that as against the decree passed by the Trial Court partly decreeing the plaintiffs suit no appeal was preferred by the defendant. Therefore, while dismissing the appeal suit preferred by the appellant on the ground that he does not have the capacity to be impleaded as legal heir of the original plaintiff, the same should not be construed to have set aside the Trial Court Judgment.

18. This will not affect the natural line of succession which opens on account of the death of original plaintiff.

Pending applications, if any, stands disposed of.