
(2013) 01 KL CK 0170
In the High Court Of Kerala
Case No : O.P. (C) No. 103 of 2013

Bobby Alexander

APPELLANT

Vs

Home Secretary

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Evidence Act, 1872 — Section 85

Citation : (2013) 2 KHC 577 : (2013) 2 KLT 949

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Syam J. Sam and Suresh Kumar Nair, for the Appellant; Lilly Leslie, Government Pleader, for the Respondent

Judgement

Thomas P. Joseph, J.—Petitioner is the Power of Attorney of the petitioners in O.P. (Suc.) No. 3 of 2012 of the Munsiff's Court, Kottarakkara. That petition was filed by the petitioners therein on 11.1.2012. Later the petitioner herein filed I.A. No. 1856 of 2012 to allow him continue the proceeding on the strength of a Power of Attorney (allegedly) executed by the petitioners in O.P. (Suc) No. 3 of 212 on 10.8.2011. The learned Munsiff has dismissed I.A. No. 1856 of 2012 as per Ext. P3, order observing that if such a Power of Attorney had been executed in favour of the petitioner herein on 10.8.2011, there was no necessity or occasion for the petitioners in O.P. (Suc.) No. 3 of 2012 to personally file that petition 11.1.2012. A further defect the learned Munsiff pointed out is that the affidavit in support of I.A. No. 1856 of 2012 is not sworn by the petitioners in O.P. (Suc) No. 3 of 2012 or any of them and hence the petitioner herein being a stranger cannot be allowed to continue the proceeding on the strength of the Power of Attorney. Since there was no respondents in O.P. (Suc) No. 3 of 2012, petitioner has arrayed the State Government as a respondent in this Original Petition.

2. I have heard the learned counsel for petitioner and the learned Government Pleader.

3. The learned counsel submits that merely for the reason that the Power of Attorney was executed on 10.8.2011 but O.P. (Suc) No. 3 of 2012 was personally filed by the petitioners therein in the court below on 11.1.2012, genuineness of the Power of Attorney which is attested before and authenticated by a Notary Public cannot be doubted. The learned counsel has placed reliance on S. 85 of the Evidence Act (for short, "the Act") in support of that contention.

4. Section 85 of the Act reads as under:

85. Permission as to powers-of-attorney.- The Court shall presume that every document purporting to be a power-of-attorney, and to, have been executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government was so executed and authenticated.

In other words, under S. 85 of the Act there is a conclusive presumption that the Power of Attorney executed before and authenticated by a Notary Public or other person referred to therein was so executed and authenticated. The expression "so executed and authenticated" means duly executed by the person by whom it is purported to be executed. Therefore if the Power of Attorney produced by the petitioner is executed before and authenticated by a Notary Public, the learned Munsiff is bound to draw the presumption under S. 85 of the Act as to its due execution and authentication. The learned Munsiff does not appear to have considered the effect of S. 85 of the Act while considering I.A. No. 1856 of 2012.

5. Since the original of the Power of Attorney is not before me (learned counsel has given me a photocopy of the Power of Attorney) I need not go into the question whether the said Power of Attorney was executed before and authenticated by a Notary Public as provided under the law.

6. That at a time the Power of Attorney was in force and if it authorizes the petitioner herein to prosecute O.P. (Suc) No. 3 of 2012, the mere fact that petitioners in that petition have personally presented O.P. (Suc) No. 3 of 2012 in the court below (at time when they were available at the spot) cannot by itself be a reason to suspect authenticity of the Power of Attorney.

7. A Power of Attorney holder could give evidence in respect of matters within his personal knowledge. He cannot be a substitute for the petitioners to give evidence in respect of matters which are within the exclusive knowledge of the petitioners. In the light of the above, I am inclined to interfere with Ext. P3, order and remit I. A. No. 1856 of 2012 for fresh decision in the light of the observations made above and in view of S. 85 of the Act.

Resultantly, the Original Petition is allowed as under:

(i) Exhibit P3, order dated 10.10.2012 on I.A. No. 1856 of 2012 in OP. (Suc.) No. 3 of 2012 of the Munsiff's Court, Kottarakkara is set aside.

(ii) I.A. No. 1856 of 2012 is remitted to the learned Munsiff, Kottarakkara for

fresh decision in the light of the observations made above.

(iii) In case learned Munsiff finds that the Power of Attorney produced by the petitioner is executed before and authenticated by a Notary Public, the learned Munsiff has to draw a presumption under S. 85 of the Act in the light of the observations made above.

(iv) In case the Power of Attorney is accepted, necessarily I.A. No. 1856 of 2012 has to be allowed in which case it will be open to the petitioner herein to prosecute O.P. (Suc.) No. 3 of 2012 and adduce evidence in respect of the matters within his knowledge.