
(2014) 11 KL CK 0175

In the High Court Of Kerala

Case No : Regular First Appeal No. 181 of 2006 (A)

Cherote Karthiayani

APPELLANT

Vs

Cherote Bharathy

RESPONDENT

Date of Decision : 06-11-2014

Acts Referred:

Evidence Act, 1872 — Section 68, 69

Citation : (2014) 11 KL CK 0175

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : T. Sethumadhavan, Pushparajan Kodoth and K. Jayesh Mohankumar, Advocate for the Appellant; P.R. Sreejith and Nirmal S, Advocate for the Respondent

Judgement

Thomas P. Joseph, J.—This appeal arises from the judgment and decree dated 04.10.2005 in O.S. No. 3 of 1986 of the IInd Additional Sub-Court, Kozhikode. Parties are referred as plaintiff and defendants for convenience.

2. The following point arises for a decision:--

"Whether the finding of the learned Sub Judge as to the due execution and attestation of Ext. B33, Will is legally and factually correct ?"

3. The suit property originally belonged to the late Peravakutty. He had 5 children - 3 sons, defendants 1 and 2 and the late Soman (husband of the plaintiff) and two daughters, the defendants 4 and 5. The third defendant is their mother (wife of Peravakutty). Peravakutty died on 20.10.1975 due to cancer. Plaintiff sought partition and separate possession of 1/3rd share in the suit property on the strength of Ext. B33, Will dated 11.10.1975 said to have been executed by the said Peravakutty bequeathing the property to the three sons. The said Will provided maintenance to the 3rd defendant at the rate of Rs. 100/- per month and right of residence to defendants 4 and 5 in the building in the suit property. Defendants 1 and 2 supported the plaintiff. The defendants 3 to 5 denied

execution of the Will and claimed that Peravakutty was not having sound disposing state of mind at the time the Will is said to have been executed, attested and registered.

4. The trial court originally granted a decree in the suit without framing an issue regarding the due execution and attestation of the Will. Both sides were aggrieved by that decree and preferred A.S Nos. 645 and 740 of 1992. The appeals were disposed of as per a common judgment dated 30.03.1992. The suit was remitted to the trial court for fresh decision on the due execution and registration of the Will. After remand an additional issue regarding the due execution and attestation of the will was framed. Further evidence was also adduced by the parties. The original of the disputed Will was marked as Ext. B33 (as against Ext. A1 marked before remand which is a registration copy of the will marked through Pw.1, the plaintiff. The trial court found in favour of due execution and attestation of the Will and passed a preliminary decree as prayed for by the plaintiff and supported by the defendants 1 and 2. That judgment and decree are under challenge in this appeal at the instance of the 5th defendant.

5. Learned counsel for the appellant/5th defendant contended that due execution and attestation of the Will are not proved. According to the learned counsel, no sufficient evidence is let in regarding authenticity of the disputed signatures of the executant and the attesting/identifying witnesses in Ext. B33. It is further argued that there is no reliable evidence regarding the sound disposing state of mind of Peravakutty at the time the Will was allegedly executed. Learned counsel submits that evidence let in by the plaintiffs and defendants 1 and 2 do not comply with the requirements of Sec. 69 of the Evidence Act (for short, "the Act"). In the circumstances, finding of the trial court regarding due execution and attestation of the Will cannot be accepted.

6. Learned counsel for the plaintiff, supported by the learned counsel for the defendants 1 and 2 contends that due execution, attestation and registration of Ext. B33 are proved by acceptable evidence. According to the learned counsel, since none of the attesting/identifying witnesses in Ext. B33 were available at the time evidence was recorded, the only way of proving due execution and attestation of the Will was by examining persons who are acquainted with the signature of the executant and attesting/identifying witnesses. That is done in this case. It is argued that the evidence of the Sub Registrar as DW.7 is sufficient to give credibility for evidence of Dws 4 to 6. Emphasis is made on the evidence of DW6. A further argument is that evidence of DW.7, the Sub Registrar assures that the executant has signed the document on the reverse side of the first page for registration and that signature tallies with the signature of the executant in Ext. B33. A comparison of those signatures is possible by this court also to arrive at the conclusion that the person who had presented the document for registration had signed the document for execution as well.

7. So far as evidence of plaintiff and the second defendant as P.W. 1 and DW.1 is concerned, it is of no avail to the plaintiff and the supporting defendants since

they were examined prior to the remand when Ext. B33, original of the disputed Will was not on record. P.W. 1 and DW.1 gave evidence with reference to Ext. A1 which is only a registration copy of the Will which did not contain signatures of the executant or the attesting/identifying witnesses.

8. Dws 3 and 4 are the sons of the attesting/identifying witnesses (the attesting/identifying witnesses are the same persons). They have stated that the attesting/identifying witnesses were not alive at the time they were examined in the trial court in the year, 2005. Dws 3 and 4 have identified the signatures of their fathers who are the attesting/identifying witnesses in Ext. B33.

9. Though learned counsel for the appellant/5th defendant has assailed the evidence of Dws 3 and 4, I do not find reason to discard it. That, Dws. 3 and 4 were summoned for giving evidence by the 8th defendant who, DW.3 said is a nephew of his father, and thus the 8th defendant and first attesting/identifying witness are closely related, by itself, is no ground to disbelieve the evidence of DW.3.

10. Yet another challenge to the evidence of Dws. 3 and 4 is that they were giving evidence in the year, 2005 about the signature of the attesting/identifying witnesses after the alleged execution of the document in the year, 1975. That, there was laps of about 30 years by itself need not and cannot be a reason to disbelieve the evidence of Dws 3 and 4 identifying the signature of their father (the attesting/identifying witnesses in Ext. B33).

11. DW.5 is the scribe of Ext. B33. He was examined in the trial court on 28.05.2005. He referred to the procedure he used to follow for preparation of the draft. He stated that he has signed Ext. B33 as the scribe. But, he does not remember whether Peravakutty had directly approached him for preparation of the draft of Ext. B33. In cross-examination on behalf of the 5th defendant, he stated that he has no prior acquaintance with Peravakutty (who is said to have executed Ext. B33). He cannot say whether the signature in Ext. B33 is that of Peravakutty. Peravakutty had not approached him directly to give instruction for preparation of the draft of Ext. B33. He does not also know whether the person who had come to prepare the draft of Ext. B33 had shown the draft to Peravakutty. Thus the evidence of DW5 is not helpful to prove due execution or attestation of Ext. B33.

12. DW.6 claimed to be a neighbour of Peravakutty and was aged about 79 years at the time of his giving evidence in the trial court. He claimed that he is acquainted with Peravakutty. His mother had purchased an item of land from Peravakutty. DW6 claimed that he has brought the original of that document to the court when he was examined and offered to produce it if so directed by the court. But none of the parties wanted that document to be produced and hence that document did not see the light of the day. DW.6, must have taken that document with him when he was discharged after examination. DW6 stated that he had money lending business for sometime and Peravakutty used to go sign

pledge forms (for availing loans). When the disputed signatures in Ext. B33 were shown to DW.6, he stated that it appeared to him that the signatures in Ext. B33 are that of Peravakutty. He stated so based on the signature of Peravakutty in the sale deed (allegedly) executed by Peravakutty in favour of his mother.

13. DW.7 was the Sub Registrar at the relevant time. She referred to the procedure she would follow in the matter of execution of a document and particularly, gift and Will. She stated that before the document is registered, she would enquire with the executant whether he/she had executed that document and on being satisfied of that would allow the document to be registered. The document in question (Ext. B33) was registered at the house of the executant as the executant was not well. She stated that the person who had produced the document for registration and the identifying witnesses had signed the document (for the purpose of registration) before her.

14. Though learned counsel for the appellant/5th defendant has argued that the evidence would reveal that Peravakutty was not having sound disposing state of mind at the time of (alleged) execution of the document, I do not find any evidence to hold so. Assuming that Peravakutty was suffering from Cancer, the (alleged) execution of Ext. B33 was on 11.10.1975 and he died on 20.10.1975, that cannot lead to the inference that Peravakutty was not having sound disposing state of mind at the time Ext. B33 is said to have been executed. May be, his physical condition was weak but what is required is sound disposing state of mind and not sound physical health. Hence I reject that contention of the appellant/5th defendant.

15. The crucial question for decision is whether the execution of Ext. B33 is proved ? Admittedly, both the attesting witnesses were dead at the time evidence was recorded in the trial court. Sec. 69 of the Act reads:

"Proof where no attesting witness found - If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

Sec. 69 thus has two limbs; proof of attestation of at least one attesting witness in his own handwriting and secondly, that the signature of the person executing the document is in the handwriting of that person.

16. I stated from the evidence of Dws 3 and 4 that the signatures of the attesting/identifying witnesses are proved. Thus the first limb of Sec. 69 of the Act is complied. Then the next question is whether the second limb of Sec. 69 of the Act is complied ?

17. Reliance is placed on the evidence of Dws.6 and 7. But DW6 has not stated that the signatures in Ext. B33 appearing to be that of the executant are of Peravakutty. He only gave his impression that the signature of the executant in

Ext. B33 appeared to be like the signature of Peravakutty. Had the original sale deed which DW6 said, was executed by Peravakutty in favour of his mother and which DW6 claimed, he had brought to the court was marked in evidence and/or the pledge forms which DW6 said, Peravakutty had signed for availing loans were called for and marked in evidence, it was possible for the court or an expert (as circumstances warranted) to compare the disputed signatures in Ext. B33 with the signature in those documents. That could not be done and was not done. Hence the impression of DW.6 that the signatures of the executant in Ext. B33 appeared to him to be of Peravakutty is not proof that the signatures in Ext. B33 are in the handwriting of Peravakutty. Hence the impression of DW.6 that the signatures of the executant in Ext. B33 are in the handwriting of Peravakutty.

18. What remains is the evidence of DW7. That relates to the registration of Ext. B33. Proof of execution and registration of the document are different. Even if it is taken that there is proper registration of the document, that is no substitute for proof of due execution of the instrument. DW.7 also had no prior acquaintance with Peravakutty. She could not say that Peravakutty is the person who executed Ext. B33. She could only say that Peravakutty is the person who executed Ext. B33. She could only say that the person who produced the document for registration admitted before her that he executed that document. Whether that person was Peravakutty is a matter on which DW7 could not, and has not given evidence. The endorsement that DW7 has made on the back of Ext. B33 is only prima facie evidence of compliance of formalities for due registration of the document.

19. Learned counsel for the plaintiff and defendants 1 and 2 argued that since due attestation of Ext. B33 is proved by the evidence of Dws.3 and 4 it must be taken that attestation was of the signatures of Peravakutty. It is also argued that since registration of Ext. B33 is proved, this court can compare the signatures of the executant and the person who produced that document for registration and conclude that the document was executed by Peravakutty and himself produced it for registration.

20. Sydney L. Dhipson in his Mannual of the Law of Evidence, 5th Edn. at page 246 says referring to *Clarke v. Clarke* (1879) 5 L.R. Ir. 47);

"Where the attesting witness is dead, insane beyond the jurisdiction or cannot be found, secondary evidence of execution must be given by proof of his handwriting, or if (but only if) this is not obtainable, by presumptive or other evidence"

(The above view is quoted with approval in *Hori Lal Vs. Gobardhan Das and Others* and *Lekha Singh and Others*, .

In *Ajudhia Prasad V. Jagannath Bhaksh Singh* (AIR 1917 Oudh 248) it is said that Sec. 69 of the Act requires proof that the signature of the executant is in his handwriting but this fact may be proved indirectly by a contemporaneous admission of execution made by the executant or by other relevant facts such as

his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature. Such an admission recorded by the Sub Registrar in his registration endorsement can be accepted in evidence as proof execution.

21. In the present case, I found that none has spoken to the signature of the executant in Exty.B33 as that of Peravakutty. I also found that evidence of Dws.3 and 4 is only proof of due attestation and that does not prove identity of the executant of Ext. B33. Based on a presumption arising from the evidence of Dws.3 and 4 as to due attestation - a further presumption regarding identity of the executant of Ext. B33 is not possible since a presumption cannot be based on another presumption(the rule against double presumption). Proof under Sec. 68 or 69 of the Act is mandatory. Useful reference can be made to a decision of the Division Bench in Simon Vs. George, . There, at the time the Will was to be proved, the attesters were not above. PW2, examined by the propounder though identified the signatures of the testators, did not speak to his familiarity with the attesting witnesses or their handwriting or signatures. The Bench observed that proof in terms of Sec. 69 of the Act is mandatory when the attesters are not alive and that a rigorous burden is cast on the propounder in terms of Sec. 69. The fact of registration was also found to be not sufficient proof on the face of the requirement under Sec. 69. Hence the said argument of learned counsel for the plaintiff and defendants 1 and 2 cannot be accepted.

22. Learned counsel then argued that defendants 3 to 5 have not produced the documents containing the signature of Peravakutty in spite of a direction to that effect by the trial court and hence an adverse inference can be drawn. When burden of proof execution lay with the propounder and that is not discharged by complying with Sec. 69 of the Act, merely relying on an adverse inference a decision in favour of due execution of the Will is not possible.

23. The above discussion leads me to the conclusion that the plaintiff and defendants 1 and 2 have not complied with the 2nd limb of Sec. 69 of the Act and thus proved due execution of Ext. B33.

24. I am however inclined to give them yet another opportunity to comply with the 2nd limb of Sec. 69 of the Act by examining persons acquainted with the signature of Peravakutty and/or proving documents containing his signature and/or by other mode provided under the law.

25. In the light of the above, judgment and preliminary decree of the trial court are liable to be set aside and the matter remitted to that court for fresh decision.

26. Resultantly, the appeal is allowed by way of remand as under:--

"1) Judgment and preliminary decree passed by the learned IInd Additional Sub Judge, Kozhikode in O.S. No. 3 of 1986 is set aside.

2) O.S. No. 3 of 1986 is remitted to the IInd Additional Sub Court, Kozhikode for fresh decision after giving plaintiff and defendants 1 and 2 to prove the second limb of Sec. 69 of the Evidence Act.

3) Needless to say that defendants 3 to 5 will get opportunity to adduce contra evidence in that regard.

4) Parties shall appear in the IInd Additional Sub Court, Kozhikode on 07.10.2013."