

(2007) 01 KL CK 0098
In the High Court Of Kerala
Case No : S.A. No. 823 of 1995

H.N. Padmanabha Hegde and Others

APPELLANT

Vs

Suneetha J. Rao and Others

RESPONDENT

Date of Decision : 17-01-2007

Acts Referred:

Evidence Act, 1872 — Section 68, 90

Citation : (2007) 2 CivCC 736 : (2007) 1 ILR (Ker) 871 : (2008) 1 KLJ 707 : (2007) 5 RCR(Civil) 378

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar, Narayanikutty Chettor, P.G. Rajagopalan and M. Gopalakrishnan Nambiar, for the Appellant; K.G. Gouri Sankar Rai, P.G. Rajagopalan and M. Gopikrishnan Nambiar, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Abdul Gafoor, J.—This Second Appeal is by the defendants 6 to 13. The only substantial question of law raised and urged before me is as follows;

On the facts and features of the case, whether the lower appellate court was right in not drawing a presumption on due execution of Ext.B1 will, which is 30 years old, as contained in Section 90 of the Evidence Act?.

2. The entire case set up by the appellants/defendants 6 to 13 centers around Ext.B1 Will, which is taken as a defence against the claim for partition by the plaintiff, one among the sisters of the appellant. The facts are as follows;

3. One Narayana Hedge, the father of the parties died in the year 1979, leaving his widow, defendant No. 1 who died during the pendency of the suit, plaintiff and defendants 2 to 5, five daughters and the appellants/defendants 6. to 13, 8 sons. The parties are governed by Mithakshara Hindu Law. According; to the plaintiff, her share in the property was not given to her in spite of the persistent demand. Finally it resulted in Ext.A1 suit notice for partition. This was replied to

in Ext.A2 notice sent on behalf of the appellants, who took up the plea that the plaintiff was not entitled to partition or to any share in the property left by the said Hedge, as he had executed Ext.B1 Will on 5-4-62. In the wake of this reply, the plaintiff instituted a suit alleging that Ext.B 1 Will was forged and that there was no reason for him to execute a will excluding all the 5 daughters including her and their mother from inheriting the properties left by him. The suit was defended on the strength of Ext.B 1 Will contending that it was duly executed by the father of the parties.

4. The parties went to trial. The evidence consists of Exts.A1 to A7 and the testimony of PW1, husband of the plaintiff on the side of the plaintiff and Exts.B1 to B4 and the oral testimony of DW 1, the 6th defendants and DW 2, who is said to be the scribe of Ext.B1, on the side of the defendants 6 to 13, the appellants.

5. Appreciating the evidence on record, the trial court came to the conclusion that "no person other than DW 2 was examined to prove the execution of the Will" and that "the evidence of DW 2 alone is not sufficient since a Will is a document which requires attestation and when the attestation is not proved, it cannot be said that the Will is true and genuine." The suit was accordingly decreed allowing 1/4th share in the plaint schedule property to the plaintiff. The defendants 6 to 13 carried the matter in appeal before the District Court, Kasaragod. Considering the matter in detail, the lower appellate Court "after having very anxiously re-evaluated and re-appreciated all the relevant facts" found that "the oral evidence of DW 1 about the execution of BI can be rejected without hesitation and the oral evidence of DW 2 is not sufficient to inspire confidence" because, according to the lower appellate court "it is not possible to accept and act upon the oral evidence of DW 2 alone to come to the conclusion that the Will has been duly executed". Accordingly, the appeal was dismissed. It is in the above circumstances, this second appeal has been filed.

6. It is contended by the counsel for the appellant heavily relying on the decision reported in *Munnalal and Ors. v. Kashibai and Ors.* 1947 PC 15 and *Acho Dominic v. Xavier* 2000 (2) KLT 402 that Ext.B 1 being a document of more than 30 years old, the presumption statutorily available in terms of Section 90 of the Evidence Act ought to have been applied in the case by the courts below without insisting for further proof of the Will. The Will is dated 5-4-62 and the Will has introduced in evidence by examining DW2 had spoken to that according to his information the attestors were not alive at that point of time. Therefore, applying Section 90 of the Evidence Act, the court below ought to have presumed the due execution and attestation of the Will, Ext.B1. That fact has only been corroborated by DW 2, the scribe of that Will. Even though in terms of Section 68 of the Evidence Act, the Will has to be proved by examining at least one among the attestors if alive, as it has been brought out from DW2 that both of them were not alive, necessarily that burden cannot be cast on the appellants to prove Ext.B1. In such circumstances, the presumption available in terms of Section 90 of the Evidence Act ought to have been applied in this case, it is submitted. Laying emphasis on

the dictum laid down in *Munnalal and Ors. v. Kashibai and Ors.* 1947 PC 15, it is contended that the presumption in terms of Section 90 is available not only with regard to the factum of attestation but also in respect of due execution as well, which includes a disposing state of mind of the executant as well. A reading of the judgments of the courts below will indicate that this legal aspect had never been considered at all. Had it been considered and the presumption applied, necessarily adequacy or otherwise or sufficiency or otherwise of the evidence tendered by DW 2 in order to prove the Will should not have been the approach adopted by the court below, to reject Ext.B1.

7. It is submitted by the counsel for the 1st respondent/plaintiff that there was no whisper in the written statement as to the reliance on the presumption available to Extr.B1 so that the plaintiff could have attempted to rebut that presumption even if it had been accepted by the court below. It is further submitted that the very purpose of examining DW 2 was for the purpose of providing Ext.B1 Will. The absence of pleading or indication about the presumption in the written statement and citing of DW 2 and examining him for the purpose of proving Ext.B 1 are sufficient enough to conclude that the appellants/ defendants 6 to 13 had never placed reliance on the presumption available u/s 90 before the Courts below. So, neither of the courts below did advert to that aspect. Therefore, having attempted to prove the Will through a witness without relying on the presumption available u/s 90 and failed in that regard, the appellants cannot be allowed to urge the contentions centered around Section 90 of the Evidence Act as a question of law in a second appeal. In this regard the decision reported in *Surendra Nath Rath and Others Vs. Sambhu Nath Dobey and Others*, is relied on. It is further submitted that Ext.B1 Will even otherwise ought not have been accepted by the Court below as it was never pleader that it was the last Will executed by the testator. Admittedly, Ext.B1 Will was executed on 5-4-1962 and the testator died in the year 1979. There was thus a gap of about 17 years, which was sufficient enough to have a change of mind under normal circumstances. If the Will executed long ago thus remains as such and when the Will was in the custody of the appellants, it was incumbent on them to plead that it was the last will of the executant. There is no such plea in the written statement. When there is no such plea, the presumption available u/s 90 will not be available to such a Will. In this regard the decision reported in *Rangu Vithoba and Others Vs. Rambha Dina and Another*, is relied on. Further it is submitted that to apply presumption in terms of Section 90 is a discretion vested with the court which can be applied only taking into account the over all circumstances revealed through the facts and evidences both on record and suspicious circumstances surrounding the Will had been pleaded by the person opposing the Will. The decision reported in *S.K. Ramaswami Goundan v. S.N.P. Subbaraya Goundan and Ors.* AIR 1949 Mad 388 is relied on in this regard. It is also submitted that in the wake of the explicit plea in the plaint that the Will was a forged one and therefore not genuine the presumption cannot be always attached, as held in *Purushamangalam Devaswom* represented by its

Uranmakaran, Parameswaran, Vasudeva Namboodiri and Anr. v. Pyli and Ors. AIR 1952 ker 438.

8. A reading of the plaint reveals that Ext.B1 Will which was specifically set forth to dispute the claim of partition urged by the plaintiff had been disposed tooth and nail by the plaintiff questioning its genuineness and even the genuineness of the attestation therein. It was also pleaded that there was no occasion for her father to execute such a Will excluding all the female natural heirs including the widow. In spite of such tooth and nail opposition against the Will propounded by the appellants/defendants 6 to 13 which was allegedly about 17 years before the death of the testator, there was no whisper in their written statement that Ext.B1 was the last Will of their father. In the decision reported in Rangu Vithoba and Others Vs. Rambha Dina and Another, it has been held that;

The mere fact that it as a registered document would not contra-indicate its cancellation at the subsequent date or the making of another Will at a later date, particularly when the testator lived for more than thirty years after the Will.... Thus, the essential basis for a suit based on a Will that it was the last Will of the testator was neither pleaded nor proved and therefore the plaintiff's suit based on the Will was bound to fail on that ground even if he was entitled to succeed on other grounds.

That was a case where the plaintiff proved the Will; whereas the case on hand is where the defendants 6 to 13 propounded the Will. DW2 has also not stated that, it was the last will of the testator nor that he had not been the scribe of any other Will by the testator. According to him he had been the scribe of other documents executed by the testator. It has also not been testified by DW 1 also that the Will in question was the last Will of the testator. Therefore, in the absence of the pleading that the Will in question, Ext.B1 executed about 17 years earlier than the death of the testator, the presumption available u/s 90 cannot be attached as held in the said decision which according to me has to be accepted as a whole on the point in question.

9. Added to this is the attempt of the appellants/defendants 6 to 13 to prove the Will by examining its scribe DW 2 without pleading as to the presumption that they claim now in terms of Section 90, in the written statement. Of course, the presumption available u/s 90 is a legal aspect which as such need not be pleaded always. But when the Will had been disputed right from the initiation of the suit by the plaintiff that it was not a genuine one and not duly attested, it was incumbent on the defendant to speak in minimum words about the availability of the presumption so as to caution the plaintiff about her responsibility to rebut the presumption. On the other hand, the affidavit dated 21-8-93 filed along with I.A. No.742/93 annexing therewith the witness list, named DW 2 as a witness indicating that he had been cited "to prove the defendant's case in the suit". The defendant's case in the suit was to defend partition on the strength of Ext.B1 Will which has to be introduced in evidence. A reading of the evidence of DW 2 not for the purpose of its re-appreciation but to understand the question of law

raised and in its impact-, will reveal that he had been giving evidence that he was the scribe of Ext.B1 and that the executant and the attestors had affixed their signature in Ext.B1 his presence and in the presence of each other. He had also added that he had been cited as a witness to prove the Will. Even during cross examination he had asserted that.... (Document shall be proved. That is my duty). Therefore, the said witness. DW 2 had been cited for, and he had deposed, proving Ext.B1 Will and not for corroborating any other evidence on record. In this regard the decision reported in Surendra Nath Rath and Ors. v. Sambhu Nath Dobey and Ors. 1927 Cal 870 is relevant. It has been held in that decision as follows:

The contentions that have been urged on behalf of the appellant in this appeal are mainly two. The first contention is to the effect that in considering the question of the genuineness or otherwise of the document of 1272 the Courts below have ignored the presumption which arise u/s 90, Evidence Act, from the fact that the document purports to be more than 30 years old, and that if that presumption had been relied upon the said Courts would have been in a position to hold that the document was a genuine one. Now, as regards this contention it is sufficient to say that upon the plain language of Section 90 the presumption that is referred to in that section is not one which it is obligatory on a Court to raise in favour of a person who desires to prove a document more than 30 years old, but that it is discretionary with the Court either to rely on that presumption or not. It is a presumption which the Court is not bound to make, and, notwithstanding that the elements mentioned in that section are satisfied, the Court may require the document to be proved in the ordinary manner. If any authority is needed for this proposition, reference may be made to the case of Shariq-un-nissa v. Shaban Ali Khan (1). Of course, if the plaintiffs asked the Court to make a presumption in their favour in accordance with the provisions of this section it would have been necessary for the court to deal with that matter, but it appears from the judgments of the Courts below as well as from the record itself that in point of fact the plaintiffs did not rely upon this presumption but, on the other hand, adduced evidence in order to prove the genuineness of the document. The evidence so adduced has been disbelieved by the learned District Judge. In these circumstances the appellants can hardly complain if this presumption can hardly complain if this presumption has not been referred to in the judgments of the Courts below.

10. The contentions urged in the case on hand and the contentions considered in that case are almost similar. Necessarily, the appellants/defendants 6 to 13 having thus attempted to prove Ext.B1 Will by examining its scribe DW2 without whispering anything as to the presumption and relying on the same in their written statement, cannot now urge Section 90 and aspects centered around now urge Section 90 and aspects centered around it, as a question of law to contend that Ext.B1 shall be taken as duly executed and duly attested on the basis of the presumption statutorily available u/s 90 of the Evidence Act.

11. It is not imperative in all cases and in a case of this nature to attribute presumption to such document automatic. As held in the decision reported in S.K. Ramaswami Goundan v. S.N.P. Subbaraya Goundan 1948 Mad 388 when suspicious circumstances surrounding the Will are alleged it will be dangerous to attach presumption on such document and when genuineness of the document is questioned, presumption cannot be allowed as a routine affair as held in the decision reported in Purushamangalam Devaswam re. by its Uranmakaran Parameswaran v. Pyli and Ors. AIR 1952 ker 438.

12. In the aforesaid circumstances, I am of the view that the only question of law now urged and argued before me does not arise in this appeal. Appeal fails and is dismissed. No costs.