

(2013) 03 KL CK 0092

In the High Court Of Kerala

Case No : Regular First Appeal No's. 552 and 620 of 2004, 540 of 2005 and 40 of 2006

Kamaleswaran Chellappan

APPELLANT

Vs

C. Kamalasanan and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3(A)
Evidence Act, 1872 — Section 11(4)(g), 67, 68
Registration Act, 1908 — Section 42, 43, 44, 45

Citation : (2013) 03 KL CK 0092

Hon'ble Judges : Pius C. Kuriakose, J;A.V. Ramakrishna Pillai, J

Bench : Division Bench

Advocate : P.A. Ahammed, for the Appellant; V. Ajakumar and Sri. T.M. Chandran for R1 and R4 and Sri. G.S. Reghunath, for R5, for the Respondent

Final Decision : Allowed

Judgement

Ramakrishna Pillai, J.—Under challenge in these appeals are the judgment and decree in O.S. No. 1285 of 1994 on the file of the Principal Sub Court, Thiruvananthapuram. The suit was filed by the appellant in R.F.A. No. 552 of 2004 against his brothers and sisters (defendants 1 to 5) for partition and separate possession of 1/6th share in the plaint items said to have been left by Gouri Ponnamma, the deceased mother of the parties.

2. The first defendant subsequently got transposed as second plaintiff. R.F.A. No. 40 of 2006 is filed by him. R.F.A. No. 620 of 2004 is filed by defendants 2 and 3 and R.F.A. No. 540 of 2004 is filed by the fourth defendant. The fifth defendant alone contested the suit. He is the common respondent in all these appeals. The parties can be referred to, as they are arrayed in the plaint.

3. Briefly put, the plaint allegations, are as follows:

The plaintiff and defendants 1 to 5 are the children of N. Chellappan and his wife

Gouri Ponnamma, who died on 30.4.1977 and 1.11.1994 respectively. Plaint "A" schedule property belonged to Late Ponnamma. Under a Will said to have been executed by late Chellappan, a letter of administration was obtained by Ponnamma in her name as per a decree in O.S. No. 9 of 1997 on the file of the District Court, Thiruvananthapuram, and on the basis of the same, she received all amounts due to Chellappan from the Kerala State Electricity Board for the contract work done by him. It was alleged that at the time of his death, lakhs of rupees were due to him from the KSE Board, as he had undertaken the works of major projects under the Board. Allegedly, all the amounts so received by Ponnamma were deposited by her in various banks. They are "B" schedule properties. It was further alleged that Chellappan was conducting a partnership business under the name and style N.C. and Company doing major contract business in Thiruvananthapuram, and after his death, Ponnamma and the fifth defendant were continuing the same. The firm had huge assets. These are included in "C" schedule. Ponnamma died intestate and the plaint schedule properties devolved on the plaintiff and defendants in equal shares. Hence, the suit.

4. Defendants 1 to 4 filed separate written statements supporting the plaintiff.

5. The fifth defendant, who resisted the suit, contended as follows:

Deceased Ponnamma had executed a Will on 30.10.1982, which is her last Will bequeathing all her properties and assets, including her bank deposits and amounts due to her to the fifth defendant absolutely. The said Will was deposited in the office of the District Registrar as a closed Will, and the same was opened on 21.11.94, on an application by the fifth defendant in his presence and it was registered as Deed No. 203 of 1994. Thus, according to the fifth defendant, he became the absolute owner of the properties of Ponnamma.

There are other allegations that the father and mother were harassed by the plaintiff and defendants 1 to 4 and they were subjected to several litigations. It is the further case of the fifth defendant that the parents were looked after by him. He would contend that large extent of properties and amounts were given to the plaintiff and defendants 1 to 4 during their life time. He has given a description of the same in paragraph (7) of the written statement filed by him.

As per the Will executed by the father, mother had received the amounts. It was also contended that after the death of the father, N.C. and company was dissolved and the partnership was re-constituted between the mother and the first defendant. After the death of the mother, it became a proprietary concern of the fifth defendant. Thus, the fifth respondent prayed for a dismissal of the suit.

6. The plaintiff filed a replication denying the execution of the Will relied on by the fifth defendant. He contended that on the date of the alleged Will, Ponnamma was staying with the fourth defendant and she was hospitalised. He would allege that she stayed with him till 3.11.1982. It was further contended that the Will was fabricated.

7. The trial court, after raising issues for trial, permitted both sides to adduce their evidence.

8. During the course of trial, the fifth defendant filed I.A. No. 4860 of 1999 under Order XVIII Rule 3(A) of the CPC to permit him to adduce evidence in this case after examining the witnesses on his part. The same was opposed by all other parties alleging that there was no special circumstance which enabled him to reserve his evidence till the completion of the examination of his witnesses. The said petition was dismissed by the trial court. The matter was carried in revision to this Court in C.R.P. No. 374 of 2000 and the same was dismissed. The fifth defendant filed Special Leave Appeal before the Apex Court as Civil Appeal No. 6102 of 2000. Before the Supreme Court, the fifth respondent changed his stand and declared his intention not to offer himself as a witness in this case. Based on the said submission, the Apex Court passed the following orders:

Learned counsel for the appellant has stated before us which is also recorded earlier in our order dated 14.7.2000 that the appellant does not desire to appear as a witness in this suit. In view of this the very question of the priority of his examination first loses its credence. In view of this, the court may proceed to examine the evidence in terms of Section 67 and 68 of India Evidence Act. Hence no question of insisting upon the appellant to be examined first arises now.

9. At the trial, on the side of the plaintiff, apart from the documents which were marked as Exts. A1 to A35 series, PWs. 1 and 2 were examined. PW1 is the second plaintiff, who was originally arrayed as the first defendant. PW2 is the daughter of PW1. On the side of the contesting defendant (fifth defendant), Ext. B1 to B50 and Exts. X1 to X8 were marked. Oral evidence was tendered by DW1 to DW7. DW1 is the District Registrar in charge, who brought the records before the court. DW2 was the District Registrar in charge on 1.11.1982 before whom, allegedly, the Will was deposited. DW3 was the then District Registrar, who gave charge to DW2. DW4 is the attester to the alleged Will. DW5 is a Senior Advocate of Thiruvananthapuram Bar, who is the Scribe of the alleged Will. DW6 is the District Registrar summoned to produce the receipt books and other documents which were not produced by DW1.

10. The trial court after an elaborate consideration of the pleadings and evidence, dismissed the suit by the impugned judgment holding that Ext. X5 (B1) Will was executed by the deceased Ponnamma, out of her own free will and consent thereby, bequeathing all the properties scheduled in the plaint to the fifth defendant and he is the absolute owner of the plaint items. Thus, these appeals have come up before us.

11. Arguments have been heard and the impugned judgment as well as the records were perused.

12. The crucial question revolves round the genuineness of Ext. X5, the alleged Will (the attested copy of the same is Ext. B1), which is said to have been executed by the deceased Ponnamma. The trial court upheld Ext. X5 (B1) Will

mainly on the following grounds:-

(a) Deceased Ponnamma was having a sound disposing mind on the alleged date of execution of Ext. X5 Will.

(b) The propounder has discharged his burden to prove the execution of the Will by examining DWs. 1 to 5.

(c) Evidence of DW4 and DW5 could be relied on as a whole especially because DW5 is "admittedly" a senior advocate of the bar.

(d) There is no suspicious circumstances in existence as alleged by the plaintiff and defendants 1 to 4 in the creation of the Will.

13. It was argued by the learned counsel for the fifth defendant that Ponnamma was a brave, bold and dominating lady having her own convictions. She knew how to write and sign. Ext. X5 (Ext. B1) Will was deposited with the District Registrar and she died after twelve years. Hence, it was argued that the relevant provisions applicable are Sections 42 to 45 and Rules 91 and 94 of the Indian Registration Act and the Rules thereunder. Exts. X1 to X4 are official documents which carries with it a presumption u/s 11(4)(g) of the Evidence Act; it was so argued. It was further argued that the alleged Will was duly deposited by the deceased Ponnamma and thereafter, she entrusted the receipt (Ext. X2/Ext. X6(a)) to the fifth defendant and on the production of the same along with the death certificate of Ponnamma, the Will was opened and registered as provided under the Registration Act and Rules. Relying on Exts. B25 to B31 it was further argued that very valuable properties were given by deceased Ponnamma and her husband to the plaintiff and the same finds a place in Ext. X5. The other reason pointed out for executing Ext. X5 is the inhuman treatment meted out to father and mother at the hands of the plaintiff and defendants 1 to 4. As fifth defendant was the only son helping the parents and who was less educated and below average was completely depending upon the parents and thus, he was given the share as per Ext. X5 (B1) Will; it was argued by the learned counsel for the fifth defendant.

14. The learned counsel for the appellants, per contra, would submit that apart from proving the due execution of the alleged Will to the satisfaction of the court, the propounder has to further clarify before the court that no suspicious circumstances existed in the creation, execution, attestation and inheritance under the Will. The learned counsel relied on certain judicial pronouncements also in support of the above arguments.

15. It was argued that a close scrutiny of the alleged Will (Ext. X5) would reveal that it was tailor made and nobody associated with the creation of the alleged Will has a clean and credit worthy background. It was pointed out that DW5 is the master brain behind the creation of the alleged Will and he had a previous history of creating bogus records for his material benefits, as evidenced by Exts. A3 and A4 series.

16. The further argument was that DW4 and her husband are bent upon to support the fifth defendant, as they are committed to him since the fifth defendant had manipulated various false records with the help of his employees, as evidenced by Ext. A2, to help her illegally. It was pointed out that though in chief examination she deposed the dates and details of the alleged Will, in cross examination she was unable and incapable of stating even the date of her marriage. It was also pointed out that DW5 had admitted that he wrote endorsement on Ext. X1 cover in his own handwriting and the same handwriting is reflected in Ext. X5(B1) Will also. It was further pointed out that DW5 has got a criminal history, as evidenced by Ext. A1. Hence, according to the learned counsel for the appellants all these grounds of suspicions remain as such over Ext. X5 (B1) Will and no court of law could rely on them confidently and safely, in accordance with the well settled legal positions on this point to come to a conclusion that deceased Ponnamma had executed Ext. X5 Will intentionally as her last Will even without a reservation to cancel the same either in part or in full, which is a normal recital in every Will. We do notice that DW1, DW2, DW3 and DW6 have no direct knowledge about deceased Ponnamma and the execution of the alleged Will.

17. By looking into Ext. X5 (B1) Will, it can be seen that it is more than an ordinary Will. Therefore, it was argued by the appellants that Ext. X5 Will could not be accepted as valid, without registration. We notice that the following questions remain unanswered, though the fifth defendant is legally bound to discharge his burden of explaining the same:

- i) How did the fifth defendant get possession of Exhibit X2 [Ext. X6(a)] receipt?
- ii) How, when and from whom did the fifth defendant get information regarding Exhibit X5 Will?
- iii) Whether the fifth defendant was aware of the contents of Ext. X5 Will before its opening on 21.11.1994 so as to exclude the presence of other heirs at the time of opening?
- iv) How did the fifth get an impression that deceased Ponnamma was in anatomical terms with other children especially DW7, PW1, D2 etc.
- v) How did the fifth defendant get information that deceased Ponnamma consulted Venkitachalam Iyer before execution of the alleged Will as suggested?
- vi) How did the fifth respondent get information that the other parties to the case got information of Ext. X5 Will before filing of this case ?

18. Going through the entire evidence in this case, we feel that the fifth defendant, who is the propounder of the alleged Will, should have removed the aforesaid suspicions by cogent and satisfactory evidence (See the decision of the Apex Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , the dictum of which was later affirmed by the Apex Court in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, . The evidence adduced by the propounder of the

Will must satisfy the judicial conscious of the court. Law places a very heavy burden on the 5th defendant to prove the due execution of the same to the satisfaction of the Court. When there are suspicious circumstances, the court has to look into the entire surrounding circumstances and probabilities. The evidence now placed on record is insufficient to enter into a definite finding. On going through the evidence and the impugned judgment, we are of the view that the court below has not taken serious note of the same. Under such circumstances, we are of the definite view that the impugned judgment and decree dismissing the suit are to be set aside and the case has to be remitted back to the trial court for fresh consideration after affording both sides an opportunity to adduce further evidence, if they choose.

In the result, these appeals are allowed. The impugned judgment and the consequential decree dismissing the suit are set aside and O.S. No. 1285 of 1994 on the file of the Principal Sub Judge, Thiruvananthapuram is remitted back to that court for fresh disposal. The trial court is directed to dispose of the case afresh after affording both sides opportunity to adduce further evidence, if they choose. The entire exercise shall be completed by the trial court within six months from the date of appearance of the parties. Parties shall mark appearance before the Principal Sub Court, Thiruvananthapuram, on 18.3.2013.