

(2013) 06 KL CK 0062

In the High Court Of Kerala

Case No : Regular First Appeal No. 902 of 2011

Kochurani

APPELLANT

Vs

Lini and Another

RESPONDENT

Date of Decision : 07-06-2013

Acts Referred:

Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63, 68

Citation : (2013) 3 ILR (Ker) 162 : (2013) 2 KHC 838 : (2013) 3 KLJ 92

Hon'ble Judges : Thottathil B. Radhakrishnan, J;B. Kemal Pasha, J

Bench : Division Bench

Advocate : Mathew John K, Sri Domson J. Vattakuzhy and Sri Sebastian Paul, for the Appellant; Lizamma Augustine, Sri M.I. Johnson and Sri Ron Bastian, for the Respondent

Final Decision : Dismissed

Judgement

B. Kemal Pasha, J.—The crux of the matter involved in this appeal is the challenge against Ext. B-3 Will in respect of the plaint scheduled property. The plaint scheduled property was bequeathed by the deceased father of the plaintiff and the first defendant to his wife deceased Pennamma, the mother of the plaintiff and the first defendant, through a Will. The first defendant is the younger sister of the plaintiff. The 2nd defendant is the husband of the first defendant. Pennamma executed Ext. B-1 Will in respect of the scheduled property thereby bequeathing the property to the first respondent as the sole legatee. On 18-11-2005, Pennamma cancelled Ext. B-1 Will and executed Ext. B-2 Will thereby bequeathing the plaint scheduled property, jointly to the plaintiff and the first defendant.

2. Pennamma was residing along with the defendants in the building situated in the plaint scheduled property. The first defendant constructed a new building in the year 2000 and thereafter the mother also shifted her residence to that house. The original of Ext. B-2 Will was in the possession of Pennamma. She was

suffering from breast cancer and her left breast was removed in a surgery and thereafter she was suffering from disease to her kidneys also. She died on 29-8-2010. Thereafter, the plaintiff has come up with the demand for partition of the plaint scheduled property, relying on Ext. B-2 Will.

3. Defendants filed a written statement and produced Ext. B-3 Will (Will No. 189 of 2010) in respect of the scheduled property executed by Pennamma, whereby the plaint schedule property was bequeathed exclusively to the first defendant, by cancelling Ext. B-2 Will. According to the defendants, during the lifetime of the father, he had given 311/2 cents of property to the plaintiff and 30 cents each to the other two daughters including the first defendant, and one acre to their brother, and also another 15 cents to the adopted daughter. The first defendant constructed a building in the said property given to her by her father, and the mother was residing along with the defendants from 2000 onwards. The mother was being looked after and maintained till her death by the defendants, and the plaintiff has never cared to look after the mother.

4. Consequent to the production of Ext. B-3 Will along with the written statement of the defendants, the plaint was amended by incorporating the relief of declaration that Ext. B-3 Will is not binding on the rights of the plaintiff over the plaint schedule property. It was also pleaded that the deceased mother had no mental capacity to exercise free Will at the time of execution of Ext. B-3 because of old age, and as she was in the advanced stage of her disease.

5. The court below has found that Ext. B-3 is the last Will of the deceased and therefore, the first defendant being the sole legatee alone is entitled to the plaint schedule property, and hence the plaint schedule property is not available for partition.

6. The learned counsel for the appealing plaintiff has argued that the deceased had no mental capacity to exercise any free Will at the time of the execution of Ext. B-3, and therefore, Ext. B-3 is lacking in free consent. As Pennamma was in the advanced stage of cancer, she was being administered with powerful medicines, which had affected her mental capacity and cognitive faculties, thereby incapacitating her to think and act freely. It was also argued that the one and only attester who was available to prove Ext. B-3 is none other than the 2nd defendant who is the husband of the first defendant.

7. The appellant plaintiff was examined as P.W.1. According to her, the scheduled property was bequeathed by her late father to her mother deceased Pennamma through Will No. 164 of 1997 of the Meenachil Sub Registry. At first, deceased Pennamma had executed Ext. B-1 Will in respect of the scheduled property in favour of first defendant. Later, she cancelled Ext. B-1 Will and executed Ext. B-2 Will on 18-11-2005 thereby bequeathing the scheduled property jointly to the appellant and the first respondent. Deceased Pennamma was residing with the respondents at the house situated in the scheduled property. When the first respondent constructed a new house in the year 2000, deceased Pennamma also

shifted to that new house. As per the versions of P.W. 1, deceased Pennamma was affected with breast cancer in the year 2006 and her left breast was removed in a surgery. Thereafter, she was under prolonged treatment for kidney disease and ultimately she died on 29-8-2010. Deceased Pennamma was undergoing treatment as in-patient at the Pala Marian Hospital and she was brought back to the house of the respondents just two days prior to the execution of Ext. B-3. After that, she was again taken to Carithas Hospital within one week. The deceased had no mental capacity to exercise any free Will at the time of execution of Ext. B-3. The 2nd respondent was a witness in Ext. B-1 as well as Ext. B-2 also.

8. The versions of P.W. 1 in cross-examination clearly reveal her embellished versions regarding the mental capacity of the deceased. According to her, she was present as bystander along with the deceased at the hospital for twelve days. When she was asked whether the deceased had told her anything regarding the execution of Ext. B-3, her answer was that during that period the deceased was unconscious. According to her, the deceased was unconscious for four months. When she was asked whether the deceased was in hospital for the said four months, she answered that intermittently the deceased was taken to the house also. According to P.W. 1, the deceased was unable to speak during that period. The deceased became unconscious on 1-5-2010. It is the case of P.W. 1 that at the time when the deceased was taken to the hospital on 1-5-2010, the deceased was conscious and she lost her consciousness when she reached the hospital. Thereafter, she was unconscious till her death. It has to be noted that P.W. 1 has no such contentions in her written statement.

9. The first respondent was examined as D.W. 1. According to D.W. 1, the deceased had executed Ext. B-3 with her free Will. Her old age and illness had never affected her mental capacity or cognitive faculties. According to D.W. 1, her husband D.W. 2 was one of the attesters not only in Ext. B-3 alone, but also in Ext. B-1 and Ext. B-2 Wills, and that he stood as attester in all those Wills at the request of the deceased. It has come out that the other attester to Ext. B-3 Will was not available during the evidence in this case, as by that time he died.

10. D.W. 2 has proved Ext. B-3 Will in terms of Section 63 of the Indian Succession Act read with section 68 of the Indian Evidence Act. According to him, the testatrix had sufficient mental capacity to execute the Will at the time of its execution.

11. In order to ascertain whether the deceased had cognitive faculties or mental capacity to execute Ext. B-3, we have perused the medical records in respect of the deceased. Ext. X-1 series are the medical records of the Marian Medical Centre, Pala. Ext. X-2 series are the medical records of the deceased from Carithas Cancer Institute, Kottayam. P.W. 3 was the Chief Physician of the Marian Medical Centre who proved Ext. X-1 series. He has been working there for the last twenty five years. According to him, Pennamma died on 29-8-2010 at 6 p.m. while she was undergoing treatment as inpatient at the said hospital. He had

examined Pennamma for the first time on 25-5-2009. On 1-5-2010 she was admitted at the said hospital. According to him, she was not bedridden, and that she could walk with help. On 15-5-2010 she was discharged from the hospital. Till 13-5-2010 she was given Prazosine tablet 5 mg. for hypertension. The dose was increased to 10 mg. from 14-5-2010 onwards. It was by prescribing the said medicine, she was discharged on 15-5-2010. When he was asked whether the said tablet would result in hallucination and confusion, he clearly deposed that he had never seen such a symptom. After her discharge on 15-5-2010 from the hospital, she was readmitted on 15-6-2010 there. In cross-examination, he has clearly deposed that he used to interact with Pennamma on everyday while she was undergoing treatment as an in-patient there. She was conscious and oriented. According to him, he had never realised any deficiency in her mental capacity during that period.

12. P.W. 4 is the Nephrologist of Carithas Hospital. He has been working there for the last 12 years. He proved Ext. X-2 case sheet of deceased Pennamma. Pennamma was brought to the hospital at first in 2007 and at that time there was only 30% functioning of her kidneys. As the entire tumor could be removed in surgery, chemotherapy was not necessitated. On 12-3-2008, again she was admitted at the hospital on account of vomiting. At that time, her kidney functioning was only 25%. She was conscious and oriented. On 12-5-2010 the deceased had come to the O.P. and met him. At that time, her creatinine level was 5.9; but the general condition was stable. On 22-5-2010 she was again admitted as in-patient at the hospital. At that time the said creatinine level was low; but dehydration was there. The same were corrected and she was discharged on 29-5-2010. When she was admitted on 22-5-2010 the consent for treatment was obtained from her daughter, Molly (D.W. 6).

13. In cross-examination, P.W. 4 has deposed that the patient would have been subjected to dialysis, had her conscious level been abnormal. According to P.W. 4, the deceased was consuming "mini press 5 mg. XL" for the last many years prior to her death and therefore, the said medicine had no adverse effect on the patient. If there was any hallucination, confusion, or paranoid symptoms, definitely that would have been recorded when the patient was admitted there and was being treated as in-patient. Further, according to him, he had never noted any such symptoms of hallucination, confusion etc. to the said patient. He had interacted with the patient when she came in the O.P. and also while she was being treated as in-patient. He had never realized any deficiency in her mental condition. In re-examination, he answered that "mini press 5 mg. XL" is Prazosine, and that Prazosine upto 40 mg. can be administered to patients suffering from hypertension. In this case, the deceased was given Prazosine upto 10 mg only. From the evidence of P.W. 3 and P.W. 4, we do not find any deficiency in the cognitive faculties or mental capacity of the deceased, during the period in which Ext. B-3 was executed.

14. D.W. 6 is the elder sister of the plaintiff and first defendant. According to her,

she was present at the time when Ext. B-3 was registered, and that she saw the registration of the document. It was the deceased who presented the document before the Sub Registrar at the house of the defendants, for registration. At that time, she was also present along with the deceased. She saw the deceased affixing her signature in the document. She witnessed the affixing of signatures by the deceased along with the 2nd defendant as well as Subramonia Iyer in Ext. B-3. During 1998 also the deceased had executed a Will thereby bequeathing the scheduled properties entirely to the first defendant. In 2005 the deceased had cancelled the said Will and executed another Will thereby bequeathing the scheduled properties jointly to the plaintiff and the first defendant. On 17-5-2010, the deceased cancelled the Will of 2005 and executed Ext. B-3 Will thereby bequeathing the plaintiff scheduled properties entirely to the first defendant. D.W. 6 has clearly deposed that at the time of execution of Ext. B-3, the deceased was fully conscious, oriented and had sufficient mental capacity.

15. The case of the appellant is that there are suspicious circumstances surrounding the execution and registration of Ext. B-3. The main point argued by the learned counsel for the appellant is that the deceased was got discharged from the hospital for the purpose of creating Ext. B-3 and that the deceased had no mental capacity to execute Ext. B-3 at the time of its execution. It is also argued that the second defendant who is the husband of the first defendant is the only available attester to prove Ext. B-3, which also points towards another suspicious circumstance. It is true that the second defendant is the only attester available at present, as the other attester, Subramonia Iyer is no more now. It is a fact that the 2nd defendant was one of the attesters to Ext. B-1 as well as Ext. B-2 also. According to the 2nd defendant, he acted as attester, only at the request of the deceased. When the 2nd defendant was attester in Ext. B-1 as well as Ext. B-2 also, there is nothing to suspect his presence as an attester to Ext. B-3.

16. In Antony Vs. Ouseph and Another , a Division Bench of this Court had occasion to consider the execution and registration of Will in similar circumstances. In that case, the Sub Registrar was taken to the hospital wherein the executor was bedridden on account of terminal cancer. Even in that case, it was held that the said Will was validly executed. Here, in this case, the document writer was also examined. On going through the evidence of the defendants, D.W. 6, P.W. 3 and P.W. 4 as well as D.W. 4 Sub Registrar, we do not find any suspicious circumstance in the execution and registration of Ext. B-3.

17. On going through the evidence of D.W. 2, who was examined as the attester of Ext. B-3, it can be seen that his evidence is in tune with the requirements of Section 63 of the Indian Succession Act, and Section 68 of the Indian Evidence Act. He had identified his signature in Ext. B-3. In the affidavit in lieu of chief examination he has affirmed that Pennamma has executed and affixed her signature in Will No. 189 of 2010 of the Meenachil Sub Registry, and that he has witnessed the execution. He affixed his signature in the said Will as per the

request of testatrix. According to him, Ext. B-3 Will was registered by bringing the Sub Registrar to the house. The executrix has affixed her signature in the document at the house. At that time he along with other witnesses were also present. We are satisfied that the genuineness of Ext. B-3 Will has been properly proved in terms of Section 63 of the Indian Succession Act. The 1st defendant who is the sole legatee and the propounder of Ext. B-3 Will could dispel the suspicious circumstances raised by the appellant in the execution of Ext. B-3 Will. Most importantly, we could realise that the embellished versions of the plaintiff as P.W. 1 regarding the prolonged unconsciousness of the deceased were only a figment of her imagination, meant for a mere challenge, without any bona fides. The judgment and decree passed by the court below do not call for any interference at all. This appeal fails, and is liable to be dismissed with costs.

In the result, this appeal is dismissed with costs.