(2008) 09 KL CK 0051

In the High Court Of Kerala

Case No : Regular Second Appeal No. 764 of 2008

Kunnummal Unnichadu APPELLANT

Vs

Ammunni and Others RESPONDENT

Date of Decision : 02-09-2008

Acts Referred:

Citation : (2008) 09 KL CK 0051

Hon'ble Judges : K.P. Balachandran, J

Bench : Single Bench

Advocate : K.P. Sudheer, for the Appellant; No Appearance, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Balachandran, J.—The second defendant in O.S.185/99 on the file of the Munsiff''s Court, Parappanangadi is the appellant, he having lost his contentions set up on the basis of Ext.B1 will to resist the suit concurrently in both the courts below. Respondents 1 to 4 as plaintiffs filed O.S.185/99 aforesaid for a decree for partition by metes and bounds of the scheduled property into six equal shares and for allotment of four such shares to them, the other sharers being defendants 1 and 2 who are their brothers. The title to claim partition as such is not disputed.

2. First defendant remained absent and ex parte. The appellant/second defendant resisted the suit contending that the said property is bequeathed to him exclusively by his father under Ext.B1 will. The contentions so set up was found against by the trial court which did not accept Ext.B1 as genuine and consequently, decreed the suit for partition as claimed. Appeal filed before the first appellate court as A.S.46/02 by the second defendant was dismissed by the first appellate court concurring with the findings of the trial court and hence, this R.S.A by the second defendant.

3. It is vehemently contended before me by the learned Counsel for the appellant that the courts below have gone wrong in finding that the testator had no

capacity to effect testamentary disposition at the time of alleged execution of Ext.B1 will especially when Ext.A1 sale deed produced by the plaintiffs is one executed subsequent to Ext.B1 will; that the report of the expert as regards the genuineness of Ext.A5 should not have been relied upon; that the finding of the courts below that Ext.B1 will was vitiated by undue influence is without pleadings in that regard; that the reasoning of the courts below that Ext.B1 will was produced only after several years which gives room to suspicion is untenable as it could be produced only when there was need to set up and assert any right on the basis thereof; that in the circumstances of the case the uneven distribution of property under Ext.B1 should not have been found as a circumstance against the genuineness of Ext.B1 will and that therefore, the concurrent findings of the courts below deserves to be reversed and the appeal allowed.

4. The very vital circumstance that militates against the genuineness of Ext.B1 will is the recital in the will that what is bequeathed is the extent from out of 53 cents excluding 15 < cents that had already been sold. The document under which 15 < cents has been sold is Ext.A1 dt.19/06/1981 whereas Ext.B1 will is dt.21/02/1981. If at all Ext.B1 will is executed on 21/02/1981 as alleged, there could not have been a reference to Ext.A1 sale deed executed almost four months thereafter and this according to the first appellate court would show that Ext.B1 will is not genuine and was not in existence as on the date of Ext.A1 and was being brought into existence at some future point of time. According to the learned Counsel for the appellant, the consideration under Ext.A1 had been received for the purpose of conduct of marriage of one of the plaintiffs and from that date onwards the property of 15 < cents had been treated as having been sold as possession had been given to the vendee and it is therefore, that in Ext.B1 recital is found regarding 15 < cents which had already been sold. Counsel also submits that the explanation found favour with the trial court though it was not accepted by the first appellate court. To accept the explanation so offered there should not have been any contrary evidence to show the incorrectness of the explanation offered. In Ext.A1 the recital is to the effect that the property sold is handed over on the date of execution of Ext.A1 and not that it had been given possession of earlier. Further, in Ext.B1 what is recited is that the property bequeathed is excluding 15 < cents which has already been sold and not that 15 < cents which had been agreed to be sold. The difference between the two is intelligible to any ordinary prudent man and even to those who are not legally well-versed.

5. The question as to the testamentary capacity of the testator to effect testamentary disposition also has to be considered irrespective of Ext.A1 executed on 19/06/1981 for the reason that Ext.B1 is not one executed on the date it bears namely 21/02/1981 for the reasons discussed above. Consequently, the testamentary power of the testator has to be independently appreciated. The question as to whether Ext.B1 will is vitiated by undue influence is a matter which has to be considered taking into account of the attendant circumstances forthcoming from the evidence, as execution of Ext.B1 will was not something

which was made known to the plaintiffs till they received a reply notice immediately preceding the institution of suit and they could only presume that Ext.B1 will was brought into existence exerting undue influence as the testator admittedly was residing with the second defendant at the time of execution of Ext.B1 will. It is common case rather it is not disputed that the testator died on 10/11/1983. The present suit for partition is instituted only in 1999. Even in the written statement filed by the appellant/second defendant, though he advanced claim on the basis of Ext.B1 will he did not produce the will though he was legally bound to produce the document if at all he was in possession thereof. For non-production of Ext.B1 will along with the written statement, he has absolutely no explanation. Thereafter also the will was not produced till it was called upon to be produced by the plaintiffs filing a petition in that behalf and on the direction of the court, on 11/12/2000. According to the learned Counsel for the appellant there was no need to produce the will at any place for the last sixteen years after the death of the testator and that was why it has not been produced though no valid explanation is there for not having produced the will along with the written statement. It is worthy to remember that the testator passed away on 10/11/1983. On the death of the testator the will naturally comes into force if at all it is executed as contended and in that event any ordinary prudent man will get mutation effected in his name in relation to the property bequeathed and would pay land tax and building tax. Nothing has been done in the instant case and that shows that Ext.B1 could not have been in existence till around the time of the institution of the suit and the appellant thought of setting up a will in defence. Another suspicious circumstance in Ext.B1 will is that the testator had not made any provision for his wife for which no explanation is forthcoming. If at all Ext.B1 is one executed on the date it bears and was executed by the testator, certainly some provision would have been made for his wife as well. This suggests that Ext.B1 is not one that has come into existence as contended. It is true that a will need not necessarily be registered, but in the instant case the evidence is to the effect that it was executed with the intention of registering it and there is no explanation as to why it was not registered either on that day or on any future date. Another circumstance pointed out by the first appellate court is regarding the amendment of written statement changing the name of the witnesses to the will made mention of therein. If at all Ext.B1 was in existence there was no question of wrongly mentioning the name of attesting witnesses in the will. It is seen from Ext.B1 that the first attestor has attested the will with his dated signature which bears the date 21/02/1981 after correcting the date originally entered as 21/02/1988. There is no explanation at all as to how a witness can affix a date which is to come after seven years though it may happen that while affixing the date, one may enter the previous year during January or February of the succeeding calendar year. It cannot in any event be a subsequent year and that too a year which is to come after seven years.

6. It is seen from attested copies of deposition furnished by the learned Counsel for the appellant for perusal that answers were being obtained in chief

examination from DWs.2 and 3 on relevant aspects in proof of will by putting leading questions to those witnesses. The evidence of DW2 shows that the testator was being caused to sign by Sreedhara Panicker assisting him to hold the pen and that after execution of the document though it was intended to be registered it was not registered on that day as time was over and the testator had to be taken to hospital and the second defendant came over and took the testator to the hospital. This shows that the second defendant was instrumental in causing Ext.B1 will to be executed if at all Ext.B1 is a document executed on the date it bears. Surprisingly, DW3 denies of the appellant/ second defendant having come over and taken the testator to hospital and according to him, the appellant had not come over there. According to DW3, the testator had signed only at one place. As regards affixing of thumb impression in the will the testimony of DW3 is not supported by the testimony of DW2 who does not speak about affixing of thumb impression at all.

7. DW4 is the scribe. He has admitted that the statement in Ext.B1 that the testator was unhealthy and bedridden; that the exclusion of 15 < cents as property which had already been sold stated in Ext.B1 etc. are as stated by the testator and that however, the testator was being brought over to his office by certain persons holding him meaning thereby that the testator was not in a position even to walk into the document writer''s office. DW4 further says that the testator had told him that he is not well and that the entire property excluding 15 < cents which had been sold has to be given to his son. He has two sons and the document writer has no case that the testator told him that it has to be in the name of the second defendant. He further says that whatever is written in Ext.B1 other than exclusion of 15 < cents and bequeathing the rest to the son of the testator and as regards ill-health of the testator, all other matters were being written by him on his own accord and not as told by the testator. According to him, it was he who advised that other children also has to be given something. Though he says that he is maintaining register recording the documents written by him, that has not been produced. To the specific question as to whether Ext.B1 has not been written recently on the request of second defendant he has stated that it is not correct. The evidence regarding physical and mental condition of the testator as deposed by DWs.2 to 4 cast suspicion as to whether he was having the requisite power of testamentary disposition. The question as to whether Ext.B1 is vitiated by fraud or undue influence arise only when Ext.B1 is seen to have been executed by the testator or is seen to have been caused to be executed by the testator and not when Ext.B1 is concocted. In the instant case the strong circumstances available from Ext.B1 itself regarding dating by the attestor as 21/02/88 and recital of sale of 15 < cents when actually no sale of 15 < cents had taken place as on 21/02/1981 the date on which Ext.B1 is stated to have been executed are circumstances which show that Ext.B1 is not a document executed in any event on 21/02/1981 the date mentioned therein. Probably that accounts for the names of the attestors being wrongly stated in the written statement initially. The second defendant who is

the propounder of the will has miserably failed to discharge the burden cast on him to establish the genuineness of Ext.B1 will either as having been executed by the testator himself or as having been executed otherwise than under undue influence and fraud, by the testator himself. Consequently, therefore, the courts below cannot be faulted in having entered finding against the genuineness of Ext.B1 will. Concurring with the findings of the courts below, I hold that Ext.B1 will is not genuine. Consequently, therefore, the decree concurrently passed by the courts below decreeing the suit allowing partition as claimed has only to be upheld and this R.S.A dismissed in limine being devoid of merit and not posing any question of law and much less any substantial question of law for consideration by this Court.

8. In the result, I dismiss this R.S.A in limine refusing admission.

