

(1995) 10 KL CK 0008
In the High Court Of Kerala
Case No : A.S. No. 203 of 1988

Natarajan and Another

APPELLANT

Vs

Sree Narayana Dharma Sanghom Trust

RESPONDENT

Date of Decision : 27-10-1995

Acts Referred:

Evidence Act, 1872 — Section 154, 67, 68, 69, 70
Limitation Act, 1963 — Section 17
Registration Act, 1908 — Section 18, 42, 46
Succession Act, 1925 — Section 45, 47, 59, 61, 63
Transfer of Property Act, 1882 — Section 3

Citation : (1996) 1 CivCC 118

Hon'ble Judges : K.G. Balakrishnan, J; B.N. Patnaik, J

Bench : Division Bench

Advocate : R. Harikrishnan and V. Satheesh, for the Appellant; S.V.S. Ayyar and V. Giri, for the Respondent

Final Decision : Allowed

Judgement

B.N. Patnaik, J.—Defendants are the Appellants. The appeal arises out of a suit for recovery of possession of plaint schedule properties from the Defendants and for a decree for post and future mesne profits at the rate of Rs. 7,750 per annum.

2. Plaintiff's case, briefly stated, is as follows: Plaintiff is a religious and charitable society situated at Varkala, Trivandrum District. It is a public trust formed with the object of disseminating and propagating the teachings and principles of Sree Narayana Guru, to hold administer and develop mutts, temples and other religious educational, cultural and charitable institutions. The father of the Defendants, late Sri S. Padmanabhan of Pandikkariyil, Vayalar East Village, Shertallai Taluk was an ardent follower of late Sree Narayana Guru. He owned vast extent of properties in Shertallai Taluk. The plaint schedule properties belonged to him. In consideration of his reverence for the Guru, he executed a Will and got it registered as No. 17/68 at the Sub Registrar's Office on 18th December 1968. He signed the Will in the presence of the witnesses, who also

signed in his presence. He had full and complete testamentary capacity at the time of execution. The testator died on 1st December 1969. By the Will, he bequeathed the plaint schedule properties in favour of the Plaintiff. The Defendants knew about this Will. But, after his death, they suppressed the fact of disposition of the properties. They entered into possession of the same notwithstanding the fact that they had the knowledge that the properties on being bequeathed by the testator, belonged to the Plaintiff. The Plaintiff and their office bearers were not aware of the existence of such a Will until Sri R. Gangadharan, an Advocate, came to know of it in March, 1980 during his visit to that area for collection of funds for the Trust. A certified copy of the registered Will was obtained on 26th April 1980. The Defendants were requested to deliver possession of the properties to the Plaintiff; but it was not successful. Finally on 9th October 1981, a registered notice was issued to the Defendants on behalf of the Trust to surrender the properties with mesne profits. In reply, the Defendants denied the validity of the Will and stated that subsequent to the date of the Will, the testator had cancelled the same and executed Anr. Will as his last Will bequeathing all the properties in favour of the Defendants. Since the Will in question was the last Will of the testator, the contention of the Defendants in their reply is false. Hence the suit was filed on 13th April 1984 as O.S. No. 67 of 1984 before the Sub Court, Shertallai.

3. The Defendants in their joint written statement, while denying their liability to deliver possession of the properties or to pay any mesne profits, state that the father of the Defendants (the testator) was residing in the building of the plaint schedule properties along with those Defendants and their mother. The Defendants are the only issues in their wedlock. Though the second Defendant took up residence at Ernakulam, the first Defendant continued to reside there with his children, father and mother. Their father developed illicit intimacy with Anr. lady for which there was no peace in the family. He became mentally and physically incapacitated and practically became insane. It is during this period, that is, at a time when he had no disposing capacity, he executed the Will. But, when he realised his folly, he handed over Anr. unregistered Will to the second Defendant where by he cancelled the earlier one. These Defendants have entered into possession of the suit properties in their capacity as legal heirs of their late father. Until the Will was cancelled, they had no knowledge of the same. The Will in question having not been duly executed, is invalid and inoperative. They are not in possession of the original draft of the Will. The suit is otherwise barred by the law of limitation.

4. Learned Sub Judge, while decreeing the suit, directed the Defendants to deliver possession of the suit properties and to pay past mesne profits at the rate of Rs. 7,750 per annum for three years preceding the suit and future mesne profits at the same rate to the Plaintiff till recovery of the suit properties or for a period of three years whichever is earlier. The learned Sub Judge held that the Will in question. Ext. A-3, was duly executed by the testator bequeathing the suit properties in favour of the Plaintiff. The testator had true and complete

testamentary capacity at the time of execution of the Will and he executed it out of his free Will. The suit was not barred by limitation in view of Section 17 of the Limitation Act and the Defendants fraudulently suppressed the Will. Ext. A-3 is the last Will executed by the testator and the Plaintiff is therefore entitled to get recovery of the suit properties from the Defendants.

5. Learned Counsel for the Defendants has contended that the Plaintiff failed to prove that the Will in question was executed in accordance with law and that the testator had the testamentary capacity to execute the same. The only question for determination in this case is whether the Will in question is a valid one or not.

6. "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

7. Section 59 of the Indian Succession Act, 1925, for short, the Act reads as follows:

59. Person capable of making Wills.-Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1. A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2. Persons who are deaf or dumb or blind or not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3. A person who is ordinarily insane may make a Will during an interval in which he is of sound mind.

Explanation 4. No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

8. The question of sound disposing mind is a question of fact and degree of mental capacity in each case. Mental weakness to constitute testamentary incapacity must be qua the Will itself. A testator ought to be capable of making his Will with an understanding of the nature of the document he is purporting to create, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. The testator's age, disease and mental weakness are all important considerations in determining the soundness of the mind of the testator at the time of the execution of the Will.

9. Section 63 of the Act lays down the rules relating to the execution of unprivileged Wills. It reads as follows

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed

by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

10. The definition of the expression "attested" as contained in Section 3 of the Transfer of Property Act reads:

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, of the signature of such other person, and each of whom has signed the instrument in the presence of the executant but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

The above provision has to be read with the provisions contained in Section 68 of the Indian Evidence Act. It reads as follows:

Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

11. Due execution in relation to a Will has three aspects. They are: (a) that it was signed by the testator; (b) that the testator was of sound disposing mind at the time and (c) that he understood the effect of the dispositions made.

12. The signature or the mark in token of execution by the testator has to be attested by at least two witnesses and each of the witnesses shall sign the Will.

Attesting is more than a mere signing of the Will. It means signing a document for a particular purpose, the purpose being to testify to the signature of the executant. Each witness must have seen the testator sign or affix his mark or if the Will is already signed each witness must have received from the testator a personal acknowledgement of his signature or mark. In so far as the attesting witnesses are concerned, the statutory requisite is that they should have the necessary intention to attest the document. It is not necessary that both the witnesses should be present at one and the same time.

13. By attestation is meant the signing of a document to signify that the attester is a witness to the execution of the document; and by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgement from the executant as regards the execution of the document. See *Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others*, .

14. In *Kashibai and Another Vs. Parwatibai and Others*, the Supreme Court observed that if none of the witnesses has deposed that the deceased had signed the Will before them, it is to be held that execution of the Will is not proved in accordance with law.

15. In *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, the Supreme Court observed:

The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Section 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes Will from other documents. Unlike other documents the Will spsaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who his already departed the world the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood. the nature and effect of the dispositions and put his signature to the document of his own free Will. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the Will may otherwise indicate that the said dispositions may not be result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances above referred to in some cases the Wills propounded disclose Anr. infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstances attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.

It is no doubt true that on the proof of the signature of the deceased or his acknowledgement that he has signed the Will he will be presumed to have known

the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.

16. Thus the legal factors concerning the proof of execution of a Will are:

(1) The testator must have attained the age of majority and should be of sound mind and had the capacity to understand the effect of disposition at the time of the execution of the Will as envisaged in Section 59 of the Act. It must have been executed of free Will. A Will, the making of which has been caused by undue influence, fraud, coercion or by such importunity as takes away the free agency of the testator is void (Section 61 of the Act).

(2) The Will should be signed or marked by the testator and it should be attested by at least two witnesses, that is to say, the witnesses saw the testator sign the Will and they signed the Will in the presence of the testator. (Section 63 of the Act).

(3) At least one attesting witness should be called for the purpose of satisfactorily proving its execution if there be an attesting witness alive. If no such witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting. (Sections 67, 68 and 69 of the Indian Evidence Act).

(4) The Will in question should be the last Will, that is to say, it was not revoked or cancelled by executing Anr. Will or codicil or destroyed by the testator later with the intention of revoking or cancelling the same as envisaged in Section 70 of the Act.

(5) The onus of proving the genuineness of the Will lies on the propounder. However, where it is pleaded that the Will was the result of undue influence, fraud, coercion, importunity or collusion perpetrated by the legatee and the propounder, the burden of proving such a fact is upon the person who alleges it.

Registration of a Will is optional (Section 18 of the Indian Registration Act, 1908). A Will may, however, be deposited with any Registrar by the testator by keeping it in a sealed cover as envisaged in Sections 42 - 46 of the Indian Registration Act.

17. The Plaintiff produced a certified copy of the registered Will on the ground that the original Will is in possession of the Defendants. Though the Defendants admit that the testator had executed a Will, yet their contention is that the same was cancelled by him during his life time and Anr. Will was executed. The latter Will is not produced by them. It was for the Defendants to produce the latter Will revoking the Will in question. That having not been done, the necessary inference is that the Will in question was not revoked or cancelled by the testator during his life time. This Will therefore can be said to be the last Will of the testator.

18. If a Will has been registered, that is a circumstance, which may have regard to the circumstances, prove its genuineness. But, the mere fact that a Will is a registered Will, will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists without submitting the evidence of registration to a close examination. See *Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another*, . One of the suspicious circumstances may be with regard to the attestation of the Will. Hence the propounder is under an obligation to prove by clear evidence that the Will was executed by the testator and duly attested by the witnesses and at the time of the execution he was a free agent and possessed of a sound and disposing state of mind.

19. In the light of the aforesaid principles of law, it has to be decided as to whether the Plaintiff as the propounder of the Will could prove that the Will in question was duly executed by the testator and attested by the witnesses according to law and that the testator was of sound mind at the time of executing the Will.

20. Plaintiff sought to prove the fact of execution and attestation by examining P.Ws. 2 and 4. P.W. 2 was the Sub Registrar at Shertallai and he registered the Will presented on 18th December 1968. P.W. 2 stated that he knew the testator. He had only completed the formalities of the Registration Act and the Rules, and he has not done more than that at the time of registration. He has not stated anywhere that the testator or any of the attesting witnesses had signed before him. It is nowhere stated by him that he read over the contents of the documents before he proceeded to register the same.

21. In *Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another*, it is laid down that if the evidence as to registration shows that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. It was observed in *Timmavva Dungappa v. Channuva Appayya* AIR 1948 Bom 322 that the certificate of admission of execution endorsed by the registering officer upon a document registered by him cannot be used as an admission of execution within the meaning of this section. The admission mentioned in Section 76 of the Indian Evidence Act must be an admission about the due execution of the document which would include an admission as to its proper attestation. The statement made by the executant before the Sub Registrar at the time, when the document is offered for registration cannot be regarded as an admission about its due attestation. The signature made by the Sub Registrar while he made the endorsement on the document admitting it to registration and the signatures of the identifying witnesses made by them when they identified the executant before the Sub Registrar cannot be regarded as the signatures of attesting witnesses. There can be no contrary opinion about the correctness of the above

proposition of law. Thus the evidence of P.W. 2 is of no avail to the Plaintiff to prove the execution of the Will in question. Moreover, in the absence of the original Will, it is not possible to find out whether the Will was signed by the testator as required under the law.

22. Admittedly, the two attesting witnesses are Kunnappaly Aravindan Sreedharan and late Advocate Sri P.S. Karthikeyan. Karthikeyan had died by the time when the suit was taken up for hearing and as such, the Plaintiff chose to examine Sreedharan as P.W. 4. There is in dispute that P.W. 4 was working as an Accountant in the factory of the testator for quite a long time and he was intimately connected with the family. He is not related to any member of that family. He has stated in his deposition that he has signed on the Will Ext. A-3. The document writer Purushothaman Pillai brought the paper to him saying that it was a deed of Will. At that time, none had signed on it. At first he refused to sign on it. But, sometime after, the document writer came and told him that the testator would commit suicide if he did not sign on it. He was afraid that he might commit something rash, hence he signed in the document. He was declared hostile by the Plaintiff and the Plaintiff was permitted to cross-examine him u/s 154 of the Indian Evidence Act. He again made it clear that no one else had signed on the document when he signed on it. Nothing has been brought out from the cross-examination done u/s 154 of the Indian Evidence Act to discredit the testimony of this witness. It cannot be presumed from the mere signatures of two persons that they have appended their signatures to the documents as attesting witnesses. It is clear from the evidence of P.W. 4 that he did not see the testator sign the Will nor did he sign the same in the presence of the testator. In view of this state of evidence with regard to execution and attestation of the Will, the irresistible conclusion is that the Plaintiff has failed to prove the due execution and attestation of the Will.

23. Although P.W. 2 has stated in the chief examination that at the time of registering the Will, the testator was not of unsound mind, yet in the cross-examination he stated that he did not know the mental condition of the testator. Of course, in the re-examination he has further deposed that he was not of unsound mind. These prevaricating statements of P.W. 2 shows that as the registering authority he did not make any attempt whatsoever to know as to whether the testator was of sound mind or not at the time of registration.

24. P.W. 4 has stated at more than one place in his deposition that the testator was mentally unsound. He showed some signs of insanity two years prior to his death. Although he was capable of managing his affairs during the said period, he committed many laches. He used to change his versions often. He lost his temper unnecessarily on many occasions. Ultimately he committed suicide. Few months before his death, he was residing with Anr. woman elsewhere by forsaking the Defendants and his wife, though later he returned back to his home.

25. The scribe of the Will has not been examined to show that at the time of writing the Will, the testator was of sound mind. No explanation is forthcoming

as to why he was not examined as a witness.

26. P.W. 5 a resident of the village near that of the Defendants admits that P.W. 4 was closely associated with the testator and his family as their Accountant. He also claims that he knew the testator and used to meet and talk to him. This witness has also made different versions with regard to the physical and mental conditions of the testator. In the chief examination he stated that Padmanabhan Muthalali had no physical or mental problems within three years prior to his death. But, in the cross-examination he stated that he had no occasion to know personally the mental condition of the testator one year prior to his death. Again in the re-examination he has stated that he used to see him when he came for taking his bath but has never talked to him. P.W. 6 happens to be a close relation of P.W. 5. He has of course stated that he did not know about any mental illness of the testator prior to his death. He also admits that P.W. 4 was working as an Accountant in the business organisation of the testator. But, he appears to be a highly interested witness. He has stated in the cross-examination that he is a devotee of Sree Narayana Guru and he has great respect for Sree Narayana Guru. He frequently visited the Plaintiff's mutt and adopted their ways of life. Admittedly, P.W. 3 is an office bearer of the Plaintiff trustee and it is he who first discovered the Will in question. P.W. 6 has further stated in the cross-examination that Advocate Gangadharan (P.W. 3) called him outside and requested him to depose about this case in Court. It was for the first time that he requested him to do so about 4 days prior to the date when he came to depose in the Court. Again in the cross-examination he states that he does not remember how he met him in the month of December, 1968. He was not aware of the state of mind of the testator and whether he had any mental problems when he met him in the month of December, 1968. These statements raise a doubt about the competence of this witness to depose about the mental condition of the testator. P.W. 1 and P.W. 3 frankly state that they did not know the testator at all. It is true that P.W. 3 states that the testator was not mentally incapable of making the Will. But, he never came in contact with the testator during the period when he executed the Will. His knowledge about the mental condition of the testator is hearsay, inasmuch as he only heard from Ors. that he was of sound mind. The Plaintiff has, therefore, failed to establish that the testator was having a sound mind at the time of execution of the Will in question.

27. For the reasons stated above, we hold that the Plaintiff has failed to prove the genuineness of the Will in question and as such it is not entitled to recover the suit property or any mesne profits as prayed for.

28. In the result, the appeal is allowed. The judgment and decree of the Court below are set aside. The suit is dismissed. Parties are directed to bear their respective costs.