
(2016) 03 KL CK 0021
In the High Court Of Kerala
Case No : A.S. No. 287 of 2000 (C)

V. Dileep Kumar	Vs	APPELLANT
V. Devaki and Others		RESPONDENT

Date of Decision : 03-03-2016

Acts Referred:

Citation : (2016) 03 KL CK 0021

Hon'ble Judges : Antony Dominic and Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : R. Parthasarathy and Parthasarathy, Advocates, for the Appellant;

Final Decision : Allowed

Judgement

Anu Sivaraman, J.—1. Appellant is the defendant in O.S. No. 39 of 1998 of the Court of the Subordinate Judge, Vadakara. Suit was for partition. The plaint schedule property and the house therein belong to one Muthachikkandy Kunkan, husband of the 1st plaintiff and father of plaintiffs 2 to 6 and the defendant. Kunkan had two more sons who predeceased him, unmarried. Kunkan died on 30.05.1998. The suit was filed for partition of the property and separate possession of shares of the plaintiffs. The contention was that the plaintiffs and the defendant were entitled to 1/7th share each in the property. The defendant filed written statement contending that Kunkan had executed a last will and testament on 27.02.1998. Under the will, the widow and children were allotted separate shares in the property and the house and the surrounding property was bequeathed to the defendant. It was contended that the will was handed over by the 2nd attesting witness Babu to Mannan, the brother-in-law of Kunkan. The said document was handed over by Mannan to Sekharan, the husband of the 5th plaintiff, after the death of Kunkan. The court below framed the following issues.

"1) Whether the Will dated 27.02.1998 executed by Kunkan Master is his last Will?

2) Whether the plaintiffs are entitled to partition of suit property?

3) Reliefs and costs?"

2. The 1st plaintiff was examined as PW1, but no documentary evidence was adduced. The defendant examined himself as DW1, the attesor of the will as DW2, the scribe who wrote the will as DW3 and the Sub Registrar as DW4. X1 to X4 witness's Exhibits were also marked. Evidence to the effect that the testator had executed the will when he was in full possession of his faculties and that the attesting witness had seen him sign the will as well as the other witness attesting the same and that DW2 had handed over the original of the will to Mannan, the uncle of the defendant was stated in the depositions of DW1 to DW4. DW3 and DW4 also spoke of the preparation, execution and registration of the will on 27.02.1998. Exhibit B1 certified copy of the will was marked. Exhibit B2 was a photocopy allegedly handed over by DW2 to DW1.

3. The case of the defendant was that a will was executed by Kunkan while in possession of full testamentary capacity on 27.02.1998. The original of the will was said to be in the possession of the husband of the 5th plaintiff. In the above circumstances, the certified copy of the will was produced and was relied upon by the defendant. The attesting witness, scribe and the Sub Registrar who registered the will were examined by the defendant to prove the execution of the will. No contra evidence was forthcoming from the side of the plaintiff. However, relying on minor discrepancies in the evidence tendered on behalf of the defendant and drawing inferences about the health and testamentary capacity of Kunkan, the court below held that the will had not been properly proved by the defendant and passed a preliminary decree of partition as prayed for. This is challenged in appeal at the instance of the defendant in the suit.

4. Heard Sri. B. Krishnan, learned counsel for the appellant and Sri. P.R. Venkatesh, learned counsel for the respondents.

5. It is urged by the learned counsel for the appellant that he had succeeded in proving the will and proper execution thereof. Learned counsel relies on the decisions of this Court reported in *Narayana Iyer v. Venkitasubramonia Iyer* (, 1957 KLT 377) to contend that to constitute undue influence which will invalidate a will, neither fiduciary relationship nor a dominating position is sufficient. In *Chithalan v. C. Ammu Amma and others* (, 1968 KLJ 123), this Court held as follows.

"22. If the evidence to prove the execution and the signature of the testator is precise enough the court is bound to accept the same. On the other hand, if there are discrepancies in the direct evidence or if there are circumstances disclosed by the direct evidence itself to throw some suspicion on the question of the execution of the will, it is open to the court to examine whether sufficient evidence is present to remove any such suspicion from the mind of the court."

6. Analyzing the precedents, a Bench of this Court in (*P. Subramanian v. Ramachandran* (, 1995(2) KLT 38) held that in the absence of initial evidence on the part of the plaintiff who disputed the genuineness of the will, the

propounders of the will need only prove the execution thereof.

7. The 1st plaintiff as PW1 pleads ignorance of the will. She has given evidence that her husband was an ailing person and could not have executed and registered such a will. She however admits that her husband was staying with her, the defendant and his family in the house situated in the plaint schedule property. She also claims that she is unaware of there being any liability on the property. She denies that the will was read after her husband passed away and that it is in the possession of Sekharan and is being suppressed from evidence.

8. The defendant as DW1 would state that his father was also a retired teacher and was in his full senses when the will was executed. He claims that the property had been subjected to mortgage with Vadakara Co-operative Rural Bank. The said mortgage had been executed by Kunkan in 1997 October. He also states that the will had been prepared by Kunkan on his own free will and volition and that he was given due consideration in the allotment of shares because he had not received any properties when his mother's assets were divided among the children. He also states that the ownership of the house had been changed to his name in the Panchayat records on the strength of the will.

9. In cross examination, he states that his mother's properties had been sold earlier and had been purchased by his brother-in-law. He denies that his mother's properties were sold to clear the liabilities incurred by him. Regarding his father's state of health he states that his father had dyspnoea, heart problems and diabetes and was hospitalized from 17.1.1998 to 23.1.1998. He states that his father was reasonably in good health when the will was executed. He does not offer any explanation why his uncle Mannan was not examined. The evidence of the attesting witness and the scribe is also consistent with the execution of the will by Kunkan. The attesting witness states to have seen Kunkan signed the will and the other attesting witness also affixing his signature after Kunkan did. The registration of the document is spoken to by DW4, who was the Sub Registrar. The court below heavily relied on the fact that the original of the will had not been produced in evidence.

10. The evidence of DW1 that the original of the will had been handed over by Mannan who read the same to Sekharan was not acceptable by the court below on the ground that the said evidence is unbelievable because if Sekharan had openly objected to the will, which was read out, as stated, Mannan would not have entrusted the same to Sekharan. The evidence of DW1 has been examined by the court below and with the aid of Exhibit X2 case sheet summoned from Janatha Hospital, Vadakara, the court below found that the patient had dyspnoea and his condition improved only on 20.01.1998. Accepting the argument of the plaintiff's counsel that Kunkan master's signature was not shown in Exhibit X2 because he was not in a condition to affix his signature, the court below came to the conclusion that Kunkan would not have been in a proper state of health to execute a will on 27.2.1998. The non-examination of Mannan and the minor discrepancies in the evidence tendered by DW2 was relied upon and the court

below found that the will propounded by the defendant cannot be held to be the last will executed by Kunkan master of his free will and consent. The issue was answered accordingly and a preliminary decree of partition on principles of intestate succession was entered.

11. Having heard the arguments advanced on either side at considerable length, we are of the opinion that the defendant had succeeded in proving the execution of a will by Kunkan master on 27.02.1998. The fact of his being in possession of adequate mental faculties and awareness of his actions have been spoken to by the defendant's witnesses. The suit was one for partition. The will having been set up as a defence by the appellant, the evidence of the plaintiff was sadly lacking in establishing any suspicious circumstance in the execution of the same. The 1st plaintiff as PW1 did not even dispute the signature of her husband or raised any allegations regarding the execution of the will. Her deposition was only to the effect that her husband was ailing and that he was not capable of executing the will. The cogent evidence adduced by the defendant in support of the execution of the will could not be discredited by the plaintiffs' side. The minor discrepancies in the oral evidence adduced are in no way sufficient to establish any suspicious circumstance or lack of testamentary capacity in a case where independent evidence is adduced to prove the execution. The evidence adduced in the case also did not go to show that Kunkan was incapable of executing a last will on 27.2.1998. In the above circumstances, we hold that the defendant had proved the execution of the will. This appeal is allowed and the preliminary decree of the court below is modified accordingly. Steps shall be taken by the court below to draw up final decree in terms of the decree in this appeal. Ordered accordingly. No costs.