(2024) 04 KL CK 0185

High Court Of Kerala

Case No: Regular Second Appeal No. 1024 Of 2015

Lissy		APPELLANT
	Vs	
Salomy		RESPONDENT

Date of Decision: April 3, 2024

Acts Referred:

- Evidence Act, 1872 - Section 68, 69

Hon'ble Judges: A.Badharudeen, J

Bench: Single Bench

Advocate: G.Sreekumar, P.M.Johny, Arun Thomas, Jennis Stephen, Santhosh Mathew, Sathish Ninan, Ajith Viswanathan, P.Viswanathan

Final Decision: Dismissed

Judgement

A. Badharudeen, J.

1. Second defendant in O.S.No.45/2006 on the files of Sub Court, Thodupuzha is the appellant herein and she assails decree and judgment in the above case dated 28.03.2012, as confirmed in A.S.No.52/2012 on the files of IInd Additional District Court, Thodupuzha, as per judgment dated 20.01.2015. The respondents herein are plaintiffs and defendants 3 to 5.

2. Heard the learned counsel appearing for the appellant/2nd defendant and the learned counsel appearing for plaintiffs 1 and 2, who are respondents 1 and 2 herein. Perused the records of trial court as well as the appellate court.

3. I shall refer the parties in this Second Appeal as to their status before the trial court as `plaintiffs' and `defendants' hereinafter for convenience.

4. Plaintiffs, who are the daughters of one late Mathew, filed Suit seeking partition of the plaint schedule property, left by Mathew, who died intestate on 25.12.1993, contending that plaintiffs and defendants viz., Abraham Mathew and Paul (plaintiffs' brothers) are entitled to get equal shares in the plaint schedule property.

5. The main contention raised by the defendants, inter alia, is that Mathew executed a Will in favour of Abraham and Paul thereby transferred the entire extent of property and no property is available for partition.

6. Trial court ventured the matter. PWs 1 to 4 were examined and Exhibits A1 to A10 were marked on the side of the plaintiffs. DW1 to DW8 were examined and Exhibits B1 to B9 were marked on the side of the defendants. Exts.X1 to X4(c) also were marked as Court exhibits. After appreciating the evidence at length, the trial court found that testator was not having sound mind for execution of Ext.B1 Will and the propounders had not succeeded in adducing satisfactory evidence to dispel the suspicion, surrounding the Will deed. Accordingly the trial court rejected the claim raised by defendants 1 and 2 on the strength of Ext.B1 Will. Consequently, excluding the property covered by Ext.B8 sale deed No.3008/1986 of SRO, Karikode, whereby Mathew sold 1 Acre 2 cents of property to one Philipose, the remaining property ordered to be partitioned in equal shares among the plaintiffs and the legal heirs of Abraham Mathew and Paul. Though appeal was filed and challenged the veracity of the verdict of the trial court, the appellate court also concurred the view of the trial court and confirmed the same.

7. At the time of admission as per order dated 24.11.2015 my learned predecessor admitted this appeal on the questions of law framed in the Memorandum of Second Appeal. Since formulation of substantial question of law is mandatory to admit and hear the Second Appeal substantial questions of law are formulated as under:

(1) Whether Ext.B1 Will is proved as mandated under Section 69 of the Evidence Act?

(2) Whether the present Suit is bad for non joinder of necessary parties, in view of Rule 228 r/w Rule 230 of the Kerala Civil Rules of Practice?

(3) What is the condition precedent to mandate compliance of Rule 228 r/w Rule 230 of the Kerala Civil Rules of Practice?

(4) Whether the trial court and the appellate court overlooked Ext.A6 partition deed to deny 1/3 right over the plaint schedule property belonged to the mother, to Abraham and Paul, relinquished by her?

8. The learned counsel for the 2nd defendant argued that none of the grounds found by the trial court and affirmed by the appellate court to disbelieve the execution of Ext.B1 Will would sustain and the finding that the Will is surrounded by doubtful

circumstances could not be justified. The learned counsel dealt with each and every finding of the trial court and appellate court, particularly, referring to the evidence of DW7, PW3, PW1 and DW1.

9. Refuting this contention, the learned counsel appearing for the plaintiffs supported the verdicts of the trial court as well as the appellate court, holding the view that Ext.B1 was not proved properly and the same is in the midst of series of doubtful circumstances. Therefore, Ext.B1, an unregistered Will, alleged to be executed by the testator, who admittedly was under treatment for cancer before the date of execution and he died on the fifth day of execution of Ext.B1 Will, could not confer title upon the propounders. Accordingly, the learned counsel for the plaintiffs supported the concurrent verdicts.

10. In this matter, there is no dispute that Mathew owned the plaint schedule property and he sold a portion of the same as per Ext.B8 sale deed in the year 1987. Ext.B1 Will deed is dated 20.12.1993 and as per Ext.A1 death certificate Mathew died on 25.12.1993. Thus the gap between execution of Ext.B1 Will and date of death of the testator is exactly 5 days. The trial court disbelieved the very execution of the Will, in a case, where both attesting witnesses to the Will, admittedly died at the time of evidence, though they were alive at the time when the Suit was filed. In such circumstances, the mode of proof of the Will shall be in accordance with Section 69 of the Indian Evidence Act, which provides as follows:

“69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

11. Thus if no such attesting witnesses can be found to prove a Will in terms of Section 68 of the Indian Evidence Act, Will must be proved in tune with the mandate of Section 69 of the Indian Evidence Act. It must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. In this matter, evidence of DW7 is relied on by the propounders to prove due execution of Ext.B1. Admittedly Ext.B1 is not a registered Will. It was alleged to be executed by the testator at the office of DW7, who is a practicing lawyer in Moovattupuzha by name Advocate V.G.Alias. His evidence is that he had been an Advocate and Notary practising in Muvattupuzha and he attested Ext.B1 Will deed. It is relevant to note regarding the putting of signature by the testator as well as witnesses, DW7 did not give direct evidence and a typical leading question with a definite answer was put to the mouth of the witness and got it answered in the affirmative. According to DW7, the testator was the elder brother of his Senior

Advocate T.S.Issac and he came to the office in Moovattupuha and executed Ext.B1 Will deed. It is surprising to note that during cross examination, DW7 given evidence that the testator as well as the witnesses were introduced by his Senior Advocate T.S.Issac and he had not counter checked the said fact. The testator as well as the witnesses were not known to him, directly. Thus by the evidence of DW7, the conditions stipulated in Section 69 of the Evidence Act are not satisfied. None of the witnesses stated that in Ext.B1 Will deed was attested by one attesting witness in his handwriting and the signature of the executant is in the handwriting of the executant. It is argued by the learned counsel for the 2nd defendant that the narration in Ext.A6, highlighting inheritance by the parties, therein, would be in no way concealed in Ext.B1 and inheritance might be on the strength of Ext.B1without mentioning the same.

12. In this context, it is relevant to note that even though Will deed was executed as on 20.12.1993, a partition deed was executed in between Abraham Mathew, Paul and mother of Abraham, Paul and wife of Mathew on 20.09.1994. Partition of the plaint schedule property was in between Abraham and Paul and in Ext.A6 the mother, who also was a party being sharer, declared that she did not want share in the property. It is one of the main reasons pointed out by the trial court and the appellate court to disbelieve Ext.B1 Will deed, since execution of Ext.A6 was not at all necessary, if there was Ext.B1 prior to that. It is relevant to note that if Abraham Mathew and Paul, who were sure that as per Ext.B1 Will the property bequeathed upon them, the very execution of Ext.A6 is unwarranted. In fact, this vital aspect alone doubts the very execution of Ext.B1 prior to Ext.A6 and this aspect probabalises that Ext.B1 is one subsequently created.

13. Regarding the physical state of the testator is concerned, PW3 was examined and PW3, (who is none other than Dr.Babu Varghese who attended the testator at Paliative Care Centre) given evidence stating that late Mathew died due to cancer and Mathew was known to him. Though in the evidence of PW3 he did not state as to whether Mathew was totally bed ridden prior to his death, PW3's evidence would suggest that Mathew undergone surgery for cancer treatment and he was under the traumas of cancer during the relevant time of execution of the Will. It is relevant to note that as per Ext.B1 Will, it has been stated that the Will was entrusted with the mother, but it was not produced before the court of law by the mother, because no such entrustment. It is pertinent to note that if the mother was entrusted with Ext.B1, the mother would never execute Ext.A6, since in such circumstance execution of Ext.B1 is totally unnecessary.

14. Apart from this evidence, the other witnesses in a way admitted the fact that Mathew was laid up due to cancer, during the period of execution of Will and prior to that. It is pertinent to note that Ext.B1 was attested by DW7. Bare perusal of Ext.B1 does not show the manner in which DW7 attested the Will. It is mandatory for a Notary

Public to maintain registers to register the works done by the Notary Public showing the attestation of a document with serial number and year, description of the document, the volume of the book such attestation was registered, fee collected for the same along with counterfoil of the fee receipt number issued thereof. On perusal of Ext.B1 these vital aspects are lacking and the same also create doubts in the execution of Ext.B1 by Mathew as on 20.12.1993.

15. Thus it is held answering the first question of law that the legal heirs of Abraham Mathew and Paul not succeeded in proving execution of Ext.B1 Will, as mandated under Section 69 of the Evidence Act and Ext.B1 Will is surrounded by doubtful circumstances as discussed.

16. Coming to the second and third questions of law, as rightly pointed out by the learned counsel for the 2nd defendant, as per Rule 228 of the Civil Rules of Practice, in every suit for partition, all persons entitled to shares or to maintenance shall be joined as parties; and if it is alleged that any co-owner has alienated any portion of the joint property or his interest therein in circumstances rendering the alienation not binding on the co-owners, the alienee shall be made a party to the suit and the party making the allegation shall set out the particulars of the alleged alienation in his pleading. Further Rule 230 deals with the matters to be determined at hearing. It has been proved that at the hearing of the suit, the Court shall determine who are the persons interested in the joint property, their respective shares and interests therein, whether there are any outstanding debts and liabilities which should be satisfied out of the joint property, and, if any allegation has been made in this behalf, whether any person has alienated any portion of the property in circumstances rendering the alienation not binding on the other co-owners or is liable to account for any particular property in his possession or in any other manner. No such question as aforesaid shall be referred to or dealt with by a Commissioner appointed to take an account or divide any property and if any such question arises before him, he shall reserve the same for the determination of the Court.

17. According to the learned counsel for the 2nd defendant, compliance of Section 228 and 230 is mandatory in this case, where the portion of the plaint schedule property was transferred as per B series documents in favour of some witnesses examined on the side of the defendants.

18. Dispelling this argument the learned Senior Counsel appearing for the plaintiffs submitted that impleadment of subsequent alienees would become mandatory only when there is an allegation to that effect. It is submitted by the learned counsel for the plaintiffs further that in the written statement no such plea raised as an allegation and therefore plaintiffs had no opportunity to comply Rule 228 and 230 of the Civil Rules of Practice. Therefore, the shares to be allotted to the purchasers, out of the property

entitled by the defendants, shall be relegated to the final decree stage. The learned counsel appearing for the 2nd defendant also conceded that no allegation in this regard seen raised in the written statement.

19. Regarding the mandate of Rule 228 is concerned, the same would be in operation only when the co-owners, who had alienated the plaint schedule property or portion thereof, would allege and raise such a plea, to the knowledge of the plaintiff/s and in the absence of such specific knowledge to the plaintiff/s, he/they could not get an opportunity to do so. Therefore, even though as per Rule 228 r/w 230 of the Civil Rules of Practice, impleadment of alienees of the co-owner/s and hearing them are mandatory, the same is possible only when such an allegation is made known to the plaintiff/s before starting trial. So alleging or putting knowledge to the plaintiff/s regarding the alienation by co-owner is a condition precedent to mandate compliance of Rule 228/ r/w 230 of the Civil Rules of Practice. In the case at hand, no such plea raised in the written statement or the said aspect not made known to the plaintiffs, and, therefore, Suit could not be held as bad for non compliance of Rule 228 and 230 of the Civil Rules of Practice.

20. It is discernible by Ext.A6 that at the time when the property got partitioned, mother relinquished her share. According to the learned counsel for the 2nd defendant, the relinquishment tantamounts to release of the said right in favour of Abraham and Paul. Therefore, 1/3 right entitled by the mother to be partitioned in between the legal heirs of Abraham and Paul and the preliminary decree passed by the trial court and confirmed by the appellate court would require modification accordingly.

21. The learned Senior Counsel appearing for the plaintiffs would submit that on reading Ext.A6, the same in no way recites that the mother relinquished her right in favour of Abraham and Paul and the mother executed Ext.A6 believing that the entire property was inherited by her, Abraham and Paul and the mother did not notice the inheritance by the plaintiffs, members of the same family, who would get benefit as per the ratio of the decision in [AIR 1986 1011], **Mary Roy v. State of Kerala.**

22. On reading Ext.A6, the same recites that on the death of Mathew the property devolved upon the mother and 2 male children. When the mother abandoned her right, that doesn't mean that the right directly transferred in favour of Abraham and Paul and the relinquishment to be understood in the sense that the property shall go in favour of the legal heirs, otherwise entitled. Therefore, it could not be held that in view of Ext.A6, the shares of the mother was relinquished in favour of the defendants. In such view of the matter, the judgment of the trial court granting ¼ share to plaintiffs 1 and 2 and legal heirs of Abraham and Paul only to be justified. Fourth substantial question of law answered accordingly.

For the foregoing reasons, the Second Appeal fails and is dismissed accordingly.

All the interim orders in this Second Appeal stand vacated and all pending Interlocutory Applications stand dismissed.

It is made clear that allotment of shares to subsequent purchasers shall be considered at the final decree proceedings from the property to be allotted in favour of the defendants, proportionally.