K.S.Dinachandran Vs Shyla Joseph

Court: High Court Of Kerala

Date of Decision: Jan. 10, 2025

Acts Referred: Code of Civil Procedure, 1908 â€" Section 96, Order 41 Rule 1, Order 41 Rule 1
Indian Succession Act, 1925 â€" Section 63(c)
Evidence Act, 1872 â€" Section 68

Hon'ble Judges: A. Badharudeen, J

Bench: Single Bench

Advocate: S.Vinod Bhat, Legith T.Kottakkal, K.R.Vinod, P.N.Sasidharan, C.A.Anupama, N.M.Mohammed Ayub, P.V.Shamsuddin

Final Decision: Dismissed

Judgement

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A. Badharudeen, J",,,,

1. R.S.A. No.915 of 2012 has been filed by the 1st defendant in O.S. No.633/2011 on the files of the II Additional Sub Court, Ernakulam under",,,,

Section 96 read with Order XLI Rule 1 and 2 of the Code of Civil Procedure, 1908, challenging the preliminary decree of partition passed in the above",,,,

case dated 14.06.2012. The respondents herein are the plaintiff and other defendants.,,,,

Ã, 2. R.F.A. No.82 of 2013 is also filed challenging the preliminary decree of partition in O.S. No.633/2011, at the instance of defendants 2, 3 and 5 to",,,,

8, arraying the plaintiff and other defendants as the respondents.",,,,

3. Heard the learned counsel for the appellants and the learned counsel appearing for the respondents, in detail. Perused the verdict under challenge",,,,

and the records of the trial court.,,,,

4. Parties in these appeals shall be referred as Ã¢â‚¬Å“plaintiffÃ¢â‚¬â€‹ and Ã¢â‚¬Å“defendantsÃ¢â‚¬â€‹ with reference to their status before the trial court.,,,,

5. Short facts:- The plaintiff instituted a suit seeking partition of the plaint schedule properties and to allot 1/9 share to her, contending that the plaint",,,,

schedule properties were originally owned by one Sreedharan, who is the father of the plaintiff and defendants and he died intestate.",,,,

6. The defendants resisted the suit mainly relying on Will Deed No.26/1988 of SRO, Ernakulam dated 26.03.1988 asserting that, as per the Will, late",,,,

Sreedharan transferred his right to the defendants in exclusion of the plaintiff and they perfected title in the respective shares in terms of the Will.,,,,

Therefore, the plaint schedule properties are not partible.",,,,

7. The trial court ventured the matter, after raising necessary issues. Exts.A1 and A2 marked on the side of the plaintiff. DWs 1 and 2 examined and",,,,

Exts.B1 to B12 marked on the side of the defendants. Ext.B2 is the Will.,,,,

8. On anxious consideration of the evidence tendered, the learned Sub Judge found that the defendants failed to prove the due execution and",,,,

attestation of Ext.B2 Will and therefore, the plaint schedule properties are partible. Accordingly, preliminary decree of partition was passed by allotting",,,,

1/9 share to the plaintiff and defendants 1 to 8.,,,,

9. While assailing the judgment of the trial court, the main challenge raised by the defendants is regarding the finding of the trial court that defendants",,,,

miserably failed to prove the execution and attestation of Ext.B2. It is zealously argued that, there are two attesting witnesses in Ext.B2, out of which,",,,,

as per the proof affidavit filed by DW1, he asserted that Sri.Xavier was no more. Accordingly, the remaining attesting witness Sri.Sadanandan got",,,,

examined. After reading the evidence given by DW2, regarding the manner in which he had signed in the Will, it is pointed out by the learned counsel",,,,

for the defendants that, DW2 given evidence that he signed in the Will in the presence of the testator and he also witnessed the testator signing the",,,,

same. Further, DW2 also given evidence that, DW2 and others signed in the Will on the same day. Relying on his evidence, it is pointed out that, when",,,,

the evidence of DW2 is taken together, the essentials necessary to prove a Will, within the ambit of Section 63(c) of the Indian Succession Act read",,,,

with Section 68 of the Evidence Act are complied and therefore, the trial court failed in holding that Ext.B2 was not properly proved.",,,,

10. The learned counsel for the defendants placed latest decision of the Apex Court reported in [2023 INSC 847] Meena Pradhan and Others v.,,,,

Kamla Pradhan and Another, where the Apex Court, after referring the earlier decisions, in paragraph Nos.10 and 11, summarized the essentials to",,,,

prove a Will as under:,,,,

10. Relying on H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp (1) SCR 426 (3- Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3-",,,,

Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91(2-Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar",,,,

Singh, (2009) 4 SCC 780 (3-Judge Bench) and Shivakumar v. Sharanabasappa, (2021) 11 SCC 277 (3-Judge Bench), we can deduce/infer the following",,,,

principles required for proving the validity and execution of the Will:,,,,

i. The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him:",,,,

ii. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.",,,,

iii. A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:",,,,

(a) The testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and the said signature or,,,,

affixation shall show that it was intended to give effect to the writing as a Will;,,,,

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary:",,,,

(c) Each of the attesting witnesses must have 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 acknowledgment of such signatures;",,,,

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;",,,,

iv. For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving",,,,

evidence, shall be examined;",,,,

v. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;,,,,

vi. If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;",,,,

vii. Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to",,,,

supplement his evidence;,,,,

viii. Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can",,,,

be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.",,,,

ix. The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It,,,,

requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound,",,,,

certain and disposing state of mind and memory of the testator at the time of execution: testator executed the Will while acting on his own free Will;,,,,

x. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are",,,,

circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing",,,,

explanation.,,,,

xi. Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind. Whether a particular feature would qualify as",,,,

'suspicious would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious,,,,

circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the",,,,

making of the Will under which he receives a substantial benefit, etc.",,,,

11. In short, apart from statutory compliance, broadly it has to be proved that (a) the testator signed the Will out of his own free Will, (b) at the time of",,,,

execution he had a sound state of mind, (c) he was aware of the nature and effect thereof and (d) the Will was not executed under any suspicious",,,,

circumstances.,,,,

11. It is pointed out by the learned counsel for the defendants that, since the law only mandates that the attesting witness should speak only about the",,,,

testatorÃ¢â‚¬â„¢s signature and also that each of the witnesses had singed the Will in the presence of the testator, Ext.B2 is proved by the evidence of",,,,

DW2.,,,,

12. The learned counsel for the plaintiff placed a decision of this Court reported in Raveendranath N. v. Sarala N. [2024 KHC OnLine 250 : 2024,,,,

KHC 250], where also this Court considered the essentials to prove a Will and held in paragraph No.11 as under:",,,,

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available, there are other methods which can be resorted to. So also it is well settled that the fate of a Will dos not depend upon the whims and fancies of an",,,,

attesting witness. Whatever that be, unless the attesting witness examined as already mentioned, proves the attestation by the other witness also, it cannot be said",,,,

that the attestation has been duly proved. In the light of the decisions referred to above, the decision reported in Varghese's Case cannot be treated as good law.",,,,

22. Therefore the principle that only one of the attesting witnesses needs to be called upon to give evidence regarding attestation and execution of the Will is,,,,

qualified by the fact that the said witness should not only speak about the execution of the document but also about the attestation by both the witnesses. The,,,,

attesting witness called upon to give evidence must speak about his own attestation and the attestation by the other witness also. If he does not do so, the",,,,

attestation of the deed could not be said to be duly proved unless the other attesting witness is also called upon to speak about the same.,,,,

23. It is true that in the case on hand there is no specific statement by P.W.2 that he had seen the other attesting witness sign the Will in the presence of the,,,,

testator, but he has stated that the other witness had also signed in the document. That statement by implication and inference shows the attestation by the other",,,,

witness also.,,,,

23. In DevassykuttyÃ¢â‚¬â„¢s case (supra), PW2 the attesting witness deposed that the other witness also singed in the Will. Therefore, this Court held",,,,

that the said Ã¢â‚¬Å“statement by implication and inference shows the attestation by the other witness alsoÃ¢â‚¬. In the instant case, DW2 in his chief-",,,,

examination not deposed anything regarding putting of signature by the other attesting witness, Sri.Xavier. It is true that, during cross-examination",,,,

when a leading question was put to the mouth of the witness by suggesting an answer in the affirmative that, all persons signed in the Will on the date",,,,

when DW2 signed the same, he answered in the affirmative. In fact, in the question itself, the answer was very much directly put. Thus, the probative",,,,

value of this part of evidence is much less. Therefore, it could not be held that the evidence of DW2 is in tune with the mandate of Section 63(c) of",,,,

the Indian Succession Act read with Section 68 of the Evidence Act. Thus, the ratio inD evassykuttyÃ¢â‚¬â„¢s case (supra) also cannot be applied in this",,,,

case.,,,,

24. Imagine for a moment that, the evidence given by DW2 is taken as sufficient to prove execution of Ext.B2 Will [but the evidence as a whole do",,,,

not suggests so] the evidence of DW2 would make his evidence contrary and unbelievable. That is to say, DW2 is not aware when he singed the Will.",,,,

But, during his cross-examination, DW2 given evidence that, after signing the Will on 26.03.1988, he did not go to the house of Sri.Sreedharan, till his",,,,

death. If so, it has to be inferred that DW2 signed in Ext.B2 Will on 26.03.1988, the previous day of its registration. At the same time, the evidence of",,,,

DW2 is that, when he reached at the house of Sri.Sreedharan to put his signature in Ext.B2, Sri.Sreedharan, Sub Registrar and Sri.Xavier were",,,,

present. But, Ext.B2 seen registered on 27.03.1988. If so, DW2 could see the presence of the Sub Registrar at the time of putting his signature only",,,,

on 27.03.1988. In such view of the matter, otherwise also the evidence of DW2 is contrary.",,,,

25. Holding so, it is held that the finding of the trial court that the defendants miserably failed to prove due execution and attestation of Ext.B2 Will is",,,,

only to be confirmed. Therefore, the decree and judgment impugned do not require any interference.",,,,

26. Accordingly, these appeals are liable to fail and the same stand dismissed. Considering the nature of these cases, there shall be no order of cost.",,,,

Point Nos.1 to 3 answered thus.,,,,

All interlocutory applications pending in these regular first appeals also stand dismissed.,,,,