C.P.Joseph Vs C.P.Francis

Court: High Court Of Kerala

Date of Decision: Jan. 23, 2025

Acts Referred: Indian Succession Act, 1925 â€" Section 63, 63(c)
Bharatiya Sakshya Adhiniyam, 2023 â€" Section 70
Evidence Act, 1872 â€" Section 71

Hon'ble Judges: M.A.Abdul Hakhim, J

Bench: Single Bench

Advocate: A.B.Jaleel, Radhika S.Anil, Nazlin Jaleel, Nijaz Jaleel, Sabu P.Joseph, C.N.Sreekumar, Manju Paul, Anil Prasad, G.Ashwini, K.Sajan Kuriakose

Final Decision: Allowed

Judgement

M.A.Abdul Hakhim, J

1. Appellants are the plaintiffs in the suit.

2. The suit was for the partition of Plaint A and B schedule properties and a permanent prohibitory injunction against alienation and committing waste.

Plaint A and B schedule properties belonged to Pius and his wife, Philomina Pius, respectively. Pius and Philomina Pius died on 24.11.2004 and

27.11.2008, respectively.

3. The plaintiffs 1 to 5 and defendants 1 and 2, and Mariya, the mother of defendants 3 and 4, are the children of Pius and Philomina Pius. Pius was

the owner of the plaint A schedule property, which had an extent of 7.875 cents of land, and the Tharawad house therein. Philomina Pious had 7.233

cents of land, out of which Philomina executed Ext.B2 Settlement Deed in favour of the fourth plaintiff for 4 cents, and the balance of 3.233 cents is

included in plaint B schedule property. Plaint A and B schedule properties formed a compact plot within a common boundary.

4. As per plaint allegations, when the first defendant refused the demand of partition from the part of plaintiffs 1 and 2, claiming that he became the

absolute owner of the plaint schedule properties by a Joint Will executed by the father and mother, the plaintiffs 1 and 2 took a copy of the same from

the Sub Registrar Office and understood that a Will is falsely created in the name of the father and the mother in favour the 1st defendant. The

plaintiffs challenged the testamentary capacity of the father and the mother and the execution of the Will.

5. The plaintiffs sought partition of plaint A and B schedule properties, praying to allot 1/8 share to each of the plaintiffs and defendants 1 and 2 and

1/8 share jointly to defendants 3 and 4.

6. Defendants 3 and 4 remained absent, and they were set ex parte.

7. The suit was contested by defendants 1 and 2 by filing a Written Statement. They admitted the relationship of the parties and the original ownership

of the parents over the plaint schedule properties. They claimed that Pius and Philomina had executed a registered Joint Will dated 27.01.2003 in

favour of the first defendant bequeathing the plaint A and B schedule properties in favour of the first defendant with the stipulation to make payments

to other sharers except for the 4th plaintiff within a period of five years after the death of both parents and creating a charge over the plaint schedule

properties with respect to those payments.

8. Thus, the 1st defendant is claiming exclusive title over the plaint schedule properties on the strength of the said Will. The certified copy of the said

Will is marked as Ext.A4 from the side of the plaintiffs, and the original of the said Will is marked as Ext.B3 from the side of the defendants.

9. On the side of the plaintiffs, PWs1 and 2 were examined, and Exts.A1 to A9 were marked. On the side of defendants 1 and 2, DWs 1 to 7 were

examined, and Exts.B1 to B11 were marked. PW1 is the fourth plaintiff. PW2 is the Doctor who issued Ext.A7 Certificate showing that Pius was

under his treatment from 13.09.2000 to 24.10.2000 at P.N.V.M. Hospital, Ernakulam. DW1 is the first defendant, DW2 is the second defendant,

DW3 is cited as the Scribe of Ext.B3 Will, DW4 is the Sub Registrar who registered Ext.B3 Will, DW5 is the wife of the first defendant, who is the

second Attesting Witness in Ext.B3, DW6 is the husband of the 3rd defendant, who is the first Attesting Witness in Ext.B3 and DW7 is the Doctor

who proved Ext.B11 original Treatment File of Lissie Hospital, Ernakulam.

10. The Trial Court found that the testators had testamentary capacity at the time of execution of Ext.B3 Will; that the evidence of DW5 is in

compliance with Section 63(c) of the Indian Succession Act, whereas the evidence of DW6 is not in compliance of Section 63 of the Indian

Succession Act; that though the evidence DW6 is not in compliance with Section 63(c) of the Indian Succession Act, it is proved that Ext.B3 is signed

by the testators as well as DW5 and DW6 as attesting witnesses, in view of the evidence of DW5 and DW4 Sub Registrar. The Trial Court arrived at

the conclusion that Pius and Philomina executed and registered Ext.B3 Will during their lifetime by their own free will, and the first defendant is

entitled to inherit the entire property, and based on such conclusion, the suit was dismissed.

11. The plaintiffs filed an appeal before the First Appellate Court, which dismissed the appeal and confirmed the judgment and decree passed by the

Trial Court.

12. This Regular Second Appeal was admitted, formulating the following substantial question of law.

Ã¢â‚¬Å“Is the evidence of DW6 in consonance with the requirement of the Indian Succession Act?Ã¢â‚¬â€‹

13. When this Regular Second Appeal came up for final hearing, I heard the learned Counsel for the appellant Sri. Nazlin Jaleel and the learned

Counsel for the 1st respondent Sri. Sabu P Jose. After hearing the counsels on either side and in view of the arguments addressed before this Court,

the following additional question of law was framed.

Ã¢â‚¬Å“Whether Ext.A4/B3 Will is void under Section 67 of the Indian Succession Act in view of the attestation of the same, who is the first defendant, and, DW6, who is

the husband of the third defendant, since benefits are reserved in the said Will in favour of those defendants?Ã¢â‚¬â€‹

14. Thereafter, further opportunity was given to the counsels for further hearing. I answer the above substantial questions of law as Nos.1 and 2 in the

light of the arguments addressed by the counsels in the succeeding paragraphs.

Question of law No.1:

15. In the evidence of DW6, who is the first Attesting Witness to Ext.B3, he specifically stated that he has not seen the executants signing in Ext.B3.

A specific leading question was put to DW6 that the signatures in Ext.B3 are the signatures of the executants and he pleaded ignorance. He added

that he did not see them signing. The evidence of DW6 does not satisfy the requirements of Section 63(c) of the Indian Succession Act. Hence, the

above substantial question of law is answered in the negative and in favour of the appellant.

16. But the Trial Court, as well as the First Appellate Court, relied on the evidence of DW4/Sub Registrar before whom Ext.B3 was registered to hold

that Ext.B3 is signed by the testators and DW5 and DW6. Under Section 70 of the Bharatiya Sakshya Adhiniyam, 2023, corresponding to Section 71

of the Indian Evidence Act, 1872, when the attesting witness denies the execution of the document, it is permissible for the Propounder to prove the

execution by other evidence. Hence, it is permissible for the 1st defendant/Propounder to prove the attestation through the evidence of the DW4 Sub

Registrar. In view of S.71 of the Bharatiya Sakshya Adhiniyam, corresponding to Section 70 of the Indian Evidence Act, the Trial Court and the First

Appellate Court are fully justified in holding that execution of Ext.B3 is proved in compliance with Section 63(c) of the Indian Succession Act. Hence,

even though the above substantial question of law is answered in favour of the appellants, it would not enable this Court to interfere with the judgment

and decree of the Trial Court, which is confirmed by the First Appellate Court.

Question of law No.2:

17. Ext.B3 is a registered Will proved as executed by Pius and Philomina. It is proved before the Court. In Ext.B3 Will, the plaint schedule properties

are bequeathed in favour of the 1st defendant. It is stated that the 4th plaintiff is not given any share since he is already given 4 cents of land as per

Ext.B2. The further stipulation in Ext.B3 Will is that the 1st defendant shall pay certain amounts to other sharers within a period of five years from the

date of death of both the testators. The 1st defendant is directed to give Rs.1 lakh each to plaintiffs 1 to 3 and Mariya, who was the mother of

defendants 3 and 4, and Rs.50,000/- each to the 5th plaintiff and the 2nd defendant. It is stated that in case the said amounts are not paid, the same

shall be a charge on the properties included therein. It is also stated that in case other movable and immovable properties belonging to the testators are

found after the death of the testators, the 1st defendant alone shall be entitled to get the said properties after the death of the testators.

18. The counsel for the appellant, as well as the counsel for the 1st respondent, argued much on the applicability of S.67 of the Indian Succession Act

to the facts and circumstances of the case.

19. The learned Counsel for the appellant contended that in view of S.67, the bequest in favor of the 1st defendant, who is the husband of the attesting

witness DW5, is void. The learned Counsel relied on the decision of this Court in Lizamma v. Saramma and others 2017 (3) KHC 27 in support of her

argument. The learned Counsel for the appellant relied on the decision of this Court in Raveendran Nair v Raman Nair and others 2019 (1) KLT 939

in which it is held that a Will or codicil attested by legatees alone or the person interested with the legatees who holds a fiduciary relationship with the

legatee would itself amount to suspicious circumstances attached to its execution.

20. On the other hand, the learned Counsel for the 1st respondent contended that S.67 is not applicable to the facts and circumstances of the case.

The learned Counsel for the 1st respondent cited the decision in Janu and others v. Thanka and others 2012 (4) KHC 361 in which it is held that the

mere fact that the beneficiaries had also appended their signature among other witnesses will not vitiate the Will and dispositions made thereunder

when there is nothing in evidence to show that the beneficiaries had influenced the testator. Learned counsel argued that the purpose behind S.67 is to

avoid influence exerted by the attesting witnesses on the testator. The plaintiffs do not have a case that it is at the influence of DW5; the Will was

executed in favour of her husband, who is the 1st defendant. The learned Counsel relied on the decision of the Hon'ble Supreme Court in Rur Singh

(D) Th. Lrs and others v. Bachan Kaur 2009(11) SCC 1 to demonstrate that in that case also, the Will was signed by one of the beneficiaries, and

even then, the Hon'ble Supreme Court upheld the Will, finding that the attestation by one of the beneficiaries does not make his evidence unbelievable.

21. S.67 of the Indian Succession Act is extracted for reference.

Ã¢â‚¬Å“A Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of a bequest or by way of appointment to any

person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting or the wife or husband of

such person or any person claiming under either of them.

Explanation.- A legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will.Ã¢â‚¬â€‹

22. Section 67 provides that merely because a benefit is given either by way of a bequest or by way of appointment to any attesting witness, the Will

shall not be deemed to be insufficiently attested, but at the same time, it clearly mandates that the bequest or appointment shall be void so far as it

relates to the attesting witness or the wife or the husband of such person.

23. In the case on hand, the wife of the 1st defendant, who is examined as DW5, is the attesting witness to Ext.B3 Will. The bequest in Ext.B3 Will is

in favour of the 1st defendant. Hence in view of Section 67, such bequest in favour of the 1st defendant is void. Nevertheless, it would not affect the

validity of Ext.B3, which Will be attested by DW5. But the sole bequest made in Ext.B3 Will is in favour of the 1st defendant, and hence the entire

Will becomes void on account of the attestation of DW5 to the Will.

24. The provisions of Part VI relating to testamentary succession under the Indian Succession Act, which are applicable to Hindu, Buddhist, Sikh, or

Jain, are included in Schedule III. As per Section 57, provisions included in Schedule III alone are applicable to them. Section 67 is absent in Schedule

III, and hence, the said provision is not applicable to Hindu, Buddhist, Sikh, or Jain. In the decisions in Jose v. Ouseph and others 2006(4) KLT 991

and Lizamma (supra), this Court made it clear that Section 67 is not applicable to Hindus. In the case on hand, the parties are admittedly Christians,

and hence, they are governed by the provisions of the Indian Succession Act, including Section 67, coming under Part VI. The decisions relied on by

the learned Counsel for the 1st respondent are not applicable to the facts and circumstances of the case, as those are decisions relating to Hindus to

whom Section 67 is not applicable.

25. The intention of the legislature is specific and clear in Section 67 that the bequest or appointment shall be void so far as it relates to the attesting

witness or the wife or the husband of such person or any person claiming under either of them. It does not admit any other interpretation. Any other

interpretation could not be brought out by the Counsel for the 1st respondent. The learned Single Judge of this Court had occasion to consider the

scope of Section 67 in the decision Lizamma (supra). It is apposite to extract relevant portions of Paragraphs No.8 and 9 in the said decision.

Ã, Ã¢â‚¬Å“On a careful reading of the Section, the following matters will be clear:

i.A Will shall not be deemed to be insufficiently attested by reason of any benefit given to any person attesting it.

ii.The benefit can either be by way of a bequest or by way of an appointment (like executor, administrator, etc.)

iii.No deemed insufficiency in attestation, even if such a benefit is given to any person attesting it or to his or her wife or husband, as the case may be.

iv. However, the bequest or appointment shall be void so far as it concerns the person so attesting, or the wife or husband of the attestor, as the case may be, or any

person claiming under either of them.

9. The sum and substance of the Section is that merely for the reason that a beneficiary has attested a Will, the document will not become void ipso facto. If any

benefit is given to the attestor by way of a bequest or by way of an appointment, he will not get any right as that bequest or appointment shall be void insofar as he

is concerned. Not only that, the attestor's wife or husband, as the case may be, and persons claiming under either of them are also precluded from claiming any

benefit or appointment, as any such benefit or appointment conferred on them by the Will shall be void.Ã¢â‚¬â€‹

26. In the above cited case also, the second attesting witness to Ext.A2 Will is the husband of the 1st defendant. Hence, this Court confirmed the

finding of the Trial Court that the 1st defendant cannot claim any right by virtue of A2 Will therein. The said decision is squarely applicable to the facts

and circumstances of the present case.

27. In view of the aforesaid discussion, I answer the aforesaid substantial question of law in the affirmative and in favour of the appellant.

28. The Trial Court, as well as the First Appellate Court, failed to consider Section 67 while deciding the case and hence could not arrive at the right

conclusion.

29. In view of the answer to the substantial question of law No.2, this Regular Second Appeal is allowed without costs, setting aside the judgments

and decrees passed by the Trial Court as well as the First Appellate Court and decreeing O.S 722/2009 on the files of the First Additional

MunsiffÃ¢â‚¬â„¢s Court:

a. by passing a Preliminary decree for partition allowing partition of plaint A and B schedule properties in eight equal shares, allotting 1/8 share to each

of the plaintiffs and defendants 1 and 2 and the remaining 1/8 share to the defendants 3 and 4 jointly.

b. granting a permanent prohibitory injunction restraining defendants 1 and 2 from alienating or encumbering the plaint A and B schedule properties

and from committing any sort of waste therein.

c. allowing the parties to apply for a final decree in accordance with the Preliminary Decree.

d. The suit is adjourned sine die.