(2006) 2 CivCC 665 : (2006) 1 ILR (Ker) 520 : (2006) 1 KLT 884

High Court Of Kerala

Case No: S.A. No. 333 of 2000

Velayudhan Nair		APPELLANT
	Vs	
Kalliyanikutty Amma		RESPONDENT

Date of Decision: Jan. 24, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 5
- Evidence Act, 1872 - Section 68
- Registration Act, 1908 - Section 17, 18, 52, 53, 60
- Succession Act, 1925 - Section 63

Citation: (2006) 2 CivCC 665 : (2006) 1 ILR (Ker) 520 : (2006) 1 KLT 884

Hon'ble Judges: V. Ramkumar, J

Bench: Single Bench

Advocate: Preethy Karunakaran, R. Rajesh Kormath and Anish S. Ambady, for the Appellant; V.V. Asokan and Sunil Shankar, for the Respondent

Final Decision: Dismissed

Judgement

V. Ramkumar, J.

The sole defendant in O.S.109/1989 on the file of the Munsiff"s Court, Manjeri was the original appellant in this Second appeal. Pending this second appeal he died and his legal representatives have been impleaded as additional appellants. The said suit instituted by the respondent herein was one for a declaration of the plaintiff"s title and possession over the plaint schedule properties on the strength of Ext.A1 will executed by Velu Nair, the father of both the plaintiff and the defendant and for consequential injunction or in the alternative, for recovery of possession of the plaint schedule properties on the strength of plaintiff"s title.

2. The trial court as per judgment and decree dated 31-1-1990 dismissed the suit holding that the plaintiff had failed to prove that Ext.A1 will dated 13-10-1977 was duly executed by the plaintiff"s father deceased Velu Nair and that the plaintiff has not succeeded in

dispelling the suspicious circumstances surrounding the execution and attestation of the will. On appeal by the defendant, the lower appellate court as per judgment and decree dated 23-10-1999 reversed the decree passed by the trial court and decreed the suit after holding that Ext.A1 will was duly executed by Velu Nair, the testator, and that the defendant had failed to prove that Velu Nair did not have a sound disposing state of mind. To arrive at this conclusion the lower appellate court had proceeded on the basis that since the execution of the will was virtually admitted by the defendant whose attack was that the will was got executed by practicing fraud and misrepresentation, the burden was on the defendant to prove his case. It is aggrieved by the decree passed by the lower appellate court that the defendant preferred this Second Appeal.

3. Notice had been issued on the following substantial questions of law formulated in the memorandum of appeal:

a) Is not the decision of the court below vitiated due to wrong casting of burden of proof on the defendant ?

b) Was the court below right in holding that the burden of proof is on the defendant to prove fraud and misrepresentation, when vitiating circumstances are pointed out to show that the execution of the will is shrouded in suspicion? Is not the propounder of the will bound to dispel the suspicious circumstances surrounding the execution of the will?

c) Since one of the attesting witness is the brother in law of the propounder and his evidence being interested, should not the propounder examine the other attesting witness?

d) Are not the findings of the court below erroneous in law, in view of the misreading of the written statement of the defendant?

e) Can Exhibit A1 will be accepted as genuine in the absence of the necessary endorsements on it to be made by the Sub Registrar before who it was registered?

f) Was the Court below justified in upsetting the well considered judgment of the Trial Court, without adverting to the reasoning thereof and without finding that it is erroneous?

g) Is not the judgment of the court below vitiated due to non consideration of the admissions made by the plaintiff ?

4. I heard the learned Counsel appearing for the appellant/defendant as well as for the respondent/plaintiff.

Appellant''s Arguments

5. Assailing the decree passed by the lower appellate court, the learned Counsel appearing for the additional appellants made the following submissions before me:

O.S.34/79 was an earlier suit filed by the very same plaintiff for a perpetual injunction claiming title under the very same will namely, Ext.A1 dated 13-10-1977 said to have been executed by the father, deceased Velu Nair. The said suit was resisted by the appellant contending inter alia that the will was not genuine and that he was a co-owner in joint possession of the property. Accepting the said defence, the trial court as well as the lower appellate court had dismissed the suit after holding that the will was not genuine and that the plaintiff had not proved exclusive possession in respect of the plaint schedule properties. In the Second Appeal filed by the plaintiff as S.A.450/83 this Court as per Ext.A8 judgment vacated the findings regarding the validity of the will holding that the question of title was irrelevant in a suit for injunction but dismissed the second appeal on the question of possession. It is thereafter that the plaintiff has filed the present suit tracing his title under the very same will. The trial court had after an exhaustive and elaborate consideration of evidence found that the plaintiff has not been able to dispel the suspicious circumstances surrounding the execution and attestation of the will. The following are the suspicious circumstances:

i) The entire plaint schedule properties have been bequeathed to the elder son, namely, the plaintiff by Velu Nair to the exclusion of his surviving wife and other son namely the defendant.

i) The signatures of Velayudhan Nair on the first and second pages of Ext.A1 materially differ.

iii) There is no statutory endorsement on Ext.A1 by the Sub Registrar indicating as to whether the attestor had admitted the execution of the will or not.

iv) There is no endorsement by the Sub Registrar as to who presented the document for registration.

v) Both the attesting witnesses to Ext.A1 document are alive. But the plaintiff examined only one of them namely P. W. 1 who is none other than his own brother-in-law. The other independent attesting witness to Ext.A1 although present in court was not examined.

vi) Velayudhan Nair, the attestor was not in a sound disposing mind as he was past 67 on the date of Ext.A1 and was ailing and had been hospitalised due to asthma and gastric disorders.

Instead of considering the sustainability or otherwise of the above suspicious circumstances discussed by the trial court, the lower appellate court has proceeded on the wrong premise that the execution of the will has been admitted by the defendant and that the burden was on the defendant to substantiate the plea of fraud set up by him behind the execution of the document. P.W.2 who is the brother-in-law of the purchaser of another property from Velu Nair was examined to prove Ext.A2 sale deed. But the original of the said sale deed was not produced so as to provide an opportunity to

compare the admitted signature of Velu Nair with his disputed signature in Ext.A1 will. The only other witness examined on the side of the plaintiff was the plaintiff himself as P.W.3 whose interested testimony does not dispel the suspicious circumstances indicated above. Even where the will is assailed on the ground of vitiating circumstances like fraud, coercion or undue influence that will not absolve the propounder of the will from removing the suspicion in the mind of the court in a case where suspicious circumstances as indicated above are present. The act of Registration by itself will not dispel the suspicion in a case where execution of the will is shrouded in suspicion. The evidence of the Sub Registrar also may not be relevant if the will is otherwise unconscionable on the face of it. The non-production of admitted signature of the attestor for comparison with the disputed signature is also a circumstance which goes against the plaintiff. The appellants rely on the following judicial pronouncements to buttress their contentions:

1. H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, - (Where the execution of the will is surrounded by suspicious circumstances, the propounder of the will must remove the suspicion from the mind of the court by cogent and satisfactory evidence failing which the court will be justified in not accepting his case that the will which is propounded is the last will of the testator).

2. Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, - (The mere fact that the will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists. The evidence of registration in such a case will have to undergo close examination. Testator not making any provision for his wife and dependant sister was considered as a suspicious circumstance surrounding the execution and attestation of the will).

3. 1981 15 KLT 8 : ILR 1982 Ker 159 A.B. Periera v. Ivy Periera and Ors. -(The propounder of the Will has to show that the will was signed by the testator, that he was at the relevant point of time in a sound disposing state of mind and that he clearly understood the nature and manner of dispositions under the instrument and their effect and that he signed the will of his own free will and in the presence of two witnesses who attested the same in his presence and in the presence of each other).

4. Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, - (In a case where execution of a will is shrouded in suspicion the propounder of the will has to adduce evidence to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party who sets up the will offers a cogent and convincing explanation for the suspicious circumstances surrounding the making of the will).

5. Guro (Smt.) Vs. Atma Singh and Others, - (Where there are suspicious circumstances surrounding the execution of the will mere proof of testamentary capacity and signature of the testator as required by law will not be sufficient to discharge the onus. The propounder of the will has to explain those circumstances to the satisfaction of the court

before the will could be accepted as genuine).

6 2002 (2) KLT 41 Sukumary v. Lydya - (Registration by itself is not sufficient to dispel all the suspicious circumstances surrounding the execution of the will).

7. Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, . -(Where there are suspicious circumstances surrounding the execution of the will mere proof of testamentary capacity and signature of the testator as required by law will not be sufficient to discharge the onus will. The propounder will have to explain those circumstances to the satisfaction of the court before the will could be accepted as genuine).

8. 2003 (2) KLJ 416 : 2003 (2) KLT 131 -Ammini Amma v. Govindan Nair - (Merely because the will is a registered one that by itself is not sufficient to remove the suspicion. One of the suspicious circumstances may be with regard to the attestation of the will. In such a case it has to be proved, apart from other things, that the instrument was attested by two or more witnesses in the manner provided u/s 63(c) of the Indian Succession Act).

9. Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, - The interestedness of the witnesses to the document may loose its significance where the Sub Registrar certifies that the same had been read over to the executant and that on doing so the executant admitted its contents.)

10. ILR 1995 Ker 567 : 1995 (1) KLT 6 Ramachandra Rao Ors. v. Rajendra Rao and Ors. Propounder not producing admitted documents before court to compare signature of the testator will be a circumstance to hold that he has not discharged the burden on him.

Judicial Resolution

7. I am afraid that I cannot agree with the above submissions made in support of the appeal.

8. The plaint schedule property consists of three items. Item No. 1 is having an extent of 69 cents comprised in R.S.No. 427/1A of Vellayoor Village of Eranadu Taluk in Malappuram District. Item No. 2 is 1.35 acres in R.S. No. 423. Item No. 3 is 1.63 acres in R.S. No. 428. Admittedly, Velu Nair who was the father of both the plaintiff and the defendant was the absolute owner in respect of the plaint schedule properties. Exts. A3 series are the documents under which Velu Nair purchased all the three items of properties. He was the Manager of one Marangat Mana and was admittedly literate and used to write his name and then affix his signatures. Velu Nair died on 10-1-1979 as evidenced by Ext.A4 death certificate. He was aged 69 on the date of his death. He was survived by his wife Parvathi Amma, his elder son Raghavan Nair (the plaintiff) and his younger son Velayudhan Nair (the defendant). Parvathy Amma, the widow of Velu Nair also died subsequently. It is also admitted that Velu Nair was residing in the house in the plaint schedule item No. 3 along with his wife and that the plaintiff also was residing with

Velu Nair along with his family. The defendant is admittedly residing separately with his family. The plaintiff has deposed before court that he was looking after the affairs of his father and that the father liked him more. Ext.A1 also recites that the executant has become old and he is looked after by the plaintiff and he is therefore desirous of making a testamentary disposition in favour of the plaintiff. In Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, the apex court accepted the circumstance that the propounder used to take care of the testatrix as relevant while upholding the will. It is well settled that all influences are not unlawful. Persuation, appeals to the affections or ties of kindred, appeals to a sentiment of gratitude for past services or pity for future destitution, are all legitimate influences which could be brought to bear on a testator to persuade him to make a disposition in favour of the propounder (see Naresh Charan v. Parbesh Charan AIR 1955 SC 763. It has also come out in evidence of the defendant examined as D.W.I that the property where he is residing was given to him by his father orally during his lifetime and it is altogether admeasuring 2.10 acres. The defendant has no case that the father had during his lifetime given any property to the respondent/ plaintiff, the elder son. If under these circumstances, the father thought it fit to make some provision for the plaintiff (the elder son) by bequeathing the plaint schedule properties to him that cannot be characterised as an unnatural bequest amounting to a suspicious circumstance. Hence the said testamentary disposition cannot be highlighted as an improvident transaction since the father had made adequate provision for the defendant during his lifetime. Even though the wife of Velu Nair survived him she had not, until her death, complained of any disinheritance during her lifetime and the question as to whether there was any provision made for the wife of Velu Nair, is, therefore, not germane for consideration.

9. The only reason attributed in support of the alleged testamentary incapacity of Velu Nair was asthma and stomach-ache which can hardly be valid reasons to affect the cognitive faculties of a person. What the law requires is a sound state of mind which is different from a sound state of health. It is not the requirement of law that the testator should have a perfect health. (See Pappo v. Kuruvilla 1994 (2) KLT 278). That apart, there is the evidence furnished by Ext.A2 sale deed by which 8 months after Ext.A1 will Velu Nair had sold another item of property for valid consideration to the brother-in-law of P.W.2 on 27-6-1978. Nobody has assailed Ext.A2 sale deed on the ground that Velu Nair did not have a sound disposing state of mind to execute the said sale deed. If after Ext.A1 will dated 13-10-1388 Velu Nair was able to execute a sale deed with the requisite state of mind and understanding nearly 9 months thereafter it would be futile for the defendant to contend that Velu Nair was not possessed of the requisite testamentary capacity. In Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, , the conduct of the testator disposing of another item of property for consideration shortly before the execution of the impugned will, was taken as proof of his having a sound disposing mind. Even the trial court has observed in paragraph 6 of its judgment that there is no evidence to show that Velu Nair was not in a sound disposing state of mind.

10. It is true that the signatures of Velu Nair in the first and 2nd pages of Ext.A1 do differ. But they are within the range of natural variation. No doubt, signature of Velu Nair on the re verse of page 1 of Ext.A1 purportedly made at the time of registration of the document differs from the signatures on pages 1 and 2 of Ext.A1. But then, there is also the thumb impression of Velu Nair. The appellant had no plea or even a statement on oath while in the witness box that the signatures in Ext.A1 are not that of his father or that his father did not execute the document or present the same for registration. What the defendant examined as DW1 stated before Court was that his suspicion is that Ext.A1 was executed by the father who was not in his proper senses. This is what he says: The plaintiff has in unequivocal terms pleaded in the plaint that Ext.A1 will was executed and registered by Velu Nair, the father. The specific plea taken in paragraph 3 of the plaint is that on 13-10-1977 Velu Nair had on his own accord got the will written and had signed the same and got it registered by going to the Sub Registry Office at Wandoor and that it was done with the specific intention of giving the properties to the plaintiff out of his special love and affection towards the plaintiff. There is no specific denial in the written statement of the assertion made in the plaint that the will was signed by Velu Nair. It, therefore, amounts to an admission within the meaning of Order VIII Rule 5 C.P.C. It is significant to note that eventhough DW1 claimed that there were several signed papers of his father at home, not one was produced, presumably because he has no dispute regarding the signatures in Ext.A1 will. There is no case in the written statement that Velu Nair did not execute the document. Far from that, the specific plea raised in paragraph 13 of the written statement was that the plaintiff had taken Velu Nair to the doctor at Wandoor under the pretext of taking him for treatment and had got the will executed and registered. If Ext.A1 was really the product of fabrication by resort to forging the signatures of Velu Nair and getting the same registered by practicing impersonation, then there was no need to take Velu Nair to Wandoor under the pretext of treating him since his participation or involvement would have been unnecessary for concocting a false document. Hence the above plea taken in the written statement only means that the defendant has no dispute regarding the execution or registration of the will. As rightly observed by the lower appellate court, this is a case in which the execution and registration of the will are admitted. He does not deny the signature as well. Under these circumstances, the lower appellate court was fully justified in proceeding on the premise that where the execution of the will is admitted, the burden is on the party who assails the document on the ground of fraud or misrepresentation to substantiate the same. Where the will is attacked on allegations of undue influence, fraud, coercion or importunity, the onus is on such person who attacks the instrument to prove the grounds alleged in support of such attack. Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, , Shibu v. Deputy Director of Panchayat 2004 (3) KLT 60 Harmes and Anr. v. Hinkson AIR 1946 PC 156. The burden of proving undue influence, fraud, collusion, forgery etc. is on the party alleging the same. Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, . There is no law which says that a testamentary instrument is compulsory registrable. On the contrary, Section 18 of the Registration Act, 1908 says that registration of Wills and other documents not compulsorily registrible u/s 17 thereof, is only optional. Even though

the registration of a will is only optional, Velu Nair had thought it fit to get the document registered.

11. Now coming to the alleged absence of the statutory endorsements of the Sub Registrar under Sections 52, 53 and 60 of the Registration Act, 1908, on Ext.A1, a close scrutiny of the document will show that the document does contain the statutory endorsement of the executant having presented the document for registration and having admitted execution and the identifying witnesses having identified the executant. However, the means employed by the Sub Registry office to incorporate the statutory endorsements has been in the form of ready-made seals, but without proper inking. Even the little ink which was on the seal had got smudged rendering it impossible to read the endorsements. It appears that many of the Sub Registry offices are using such ready-made seals instead of taking pains to write the statutory endorsements in manuscript form. The affixing of seals has become so ritualistic that least care is taken to ensure that the impression of the seal is properly got affixed on the instrument enabling any person reading the endorsements, to do so without any difficulty. Had proper care been taken in this case, the endorsements could not have been the subject matter of controversy. It is high time that the practice of affixing seals, instead of legibly writing the statutory endorsements on the instruments presented for registration, was discontinued so that the solemn act of statutory compliance by Sub Registrars does not become an empty formality nor does it come up for unsavoury criticism in courts of law. The solemn duty of the Sub Registrar arriving at the requisite satisfaction which he is statutorily enjoined to arrive and if need be, after examining the executant on oath, cannot be delegated to a peon who may mechanically affix a seal prepared in that behalf without knowing the significance or relevance of the same. This is a matter which should engage the attention of the Government. A copy of this judgment shall be forwarded to the Inspector General of Registration, Government of Kerala, Thiruvananthapuram and to the concerned Principal Secretary/Secretary having administrative control over the Registration Department to consider the desirability of dispensing with the unwholesome practice of affixing seals as aforesaid. Eventhough in view of the decision reported in Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, , such statutory endorsements by the Sub Registrar can be relied on in proof of the execution of the Will, I am not giving much importance to the same in this case due to the unintelligible nature of those endorsements for the reasons already indicated.

12. There is, however, the credible evidence of RW. 1, one of the attesting witnesses who has proved due execution of the will in the manner required by Section 63(c) of the Indian Succession Act, 1925. It is true that out of the two attesting witnesses, one alone (i.e. PW1) was examined. But the law does not insist upon examination of both the attestors in proof of execution of the will although attestation by at least two witnesses is compulsory. This is clear from Section 68 of Evidence Act, 1872 read with Section 63(c) of the Succession Act, 1925. (See also H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , Karri Nookaraju Vs. Putra Venkatarao and Others, and George Vs. Varkey, . It is

true that PW1 is the brother of the wife of the propounder. But the law does not prohibit close relatives from figuring as attestors to wills. It is common knowledge that when a testamentary instrument is executed the testators very often request close relations rather than total strangers to attest the same. What the law insists is proof of due execution which PW1 has credibly proved.

13. Denial of property to natural heirs or uneven distribution of assets among the heirs under a will etc. do not by themselves constitute suspicious circumstances. The very purpose behind the execution of a will is to disturb the natural order of succession and therefore there cannot be anything unusual about it. (See in this connection S. Sundaresa Pai and Others Vs. Sumangala T. Pai and Another, , Madhavi Amma v. Chandrasekharan 2004 (3) KLT 60, Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, .

14. After an anxious consideration of the pleadings and evidence in this case I am satisfied that the plaintiff who is the propounder of Ext. A1 will has discharged the onus probandi which was on him and has satisfied the conscience of the court that Ext.A1 was truely the last will of a free and capable testator. The circumstances relied on by the defendant are not sufficient to excite the suspicion of the court. I am afraid that the trial court approached the instrument with an obdurate persistence in disbelief and a resolute and impenetrable incredulity rather than a reasonable scepticism. It is heartening to find that the lower appellate court proceeded in the correct direction.

15. The questions on which notice had been ordered in this second appeal are liable to be answered against the defendant and I do so. In fact, no question of law, much less, any substantial question of law arises in this appeal. A finding regarding the execution and attestation of the will is a pure question of fact depending on appreciation of evidence. (See paragraph 12 in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, and paragraph 20 in Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, .

I, therefore, do not find any merit in this Second Appeal which is accordingly dismissed, but in the circumstances of the case, without costs.