(1998) 02 KL CK 0033

High Court Of Kerala

Case No: S.A. No. 1111 of 1989-G

Baburajan		APPELLANT
	Vs	
Parukutty and Others		RESPONDENT

Date of Decision: Feb. 27, 1998

Acts Referred:

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 63, 70

Citation: AIR 1998 Ker 274 : (1999) 1 CivCC 692 : (1999) 2 ILR (Ker) 374 : (1999) 2 RCR(Civil) 317

Hon'ble Judges: P.K. Balasubramanyan, J

Bench: Single Bench

Advocate: K.T. Sankaran, for the Appellant; M.A.T. Pai, N.K. Sreedharan and A.K. Madhavan Unni, for the Respondent

Final Decision: Dismissed

Judgement

P.K. Balasubramanyan, J.

The plaintiff is the appellant. He filed a suit for partition of the plaint schedule property on the basis that his father Kultappu died intestate. Defendants 5 and 6 propounded a Will and contended that the testator had bequeathed the properties to them. The Courts below upheld the will and consequently found that the plaintiff was not entitled to a partition. The suit was hence dismissed. The plaintiff has come up with this second appeal. The substantial questions of law so formulated are whether it could be held that the execution of the Will had been properly proved in terms of Section 68 of the Indian Evidence Act, whether this was not a case where the Will was not revoked by the testator and whether the properties that are the subject-matter of the suit are not joint family properties over which, the plaintiff has a share by birth. I may say that the last aspect was based on a plea which the plaintiff had that the plaint schedule properties were acquired by the consideration obtained by sale of an item of joint family property and the plaintiff as a son, had a

right over the property, acase which was foundagainst by the Courts below.

2. The plaintiff and defendants 2 to 7 are the children of Kuttappu and the first defendant. Kuttappu died on 29-5-1980. Just before Kuttappu died, Kultappu and his wife filed a suit O.S. 420 of 1980 before the Munsiff s Court, Trichur for an injunction restraining the present plaintiff from entering the plaint A schedule property and some other properties. In that plaint, Kuttappu had averred that he had executed a will which is ''the one now been propounded. In that suit, Kuttappu and the first defendant obtained an interim injunction. The present plaintiff challenged that order of injunction in C.M.A. 43 of 1980 before the District Court. Arguments were heard on the Civil Miscellaneous Appeal. Summer vacation for the Courts intervened before the order was pronounced. According to the plaintiff, there was a mediation in the dispute between the son and the father, in the presence of the two uncles of the plaintiff, PWs. 2 and 3 and the brother of Kuttappu one Ayyappu examined as PW. 5. The plaintiff''s case is that Kuttappu entrusted the disputed Will to PW 5 and told him that he intended to cancel the Will and intended to give the property to all his children and as a preliminary step, the Will was being entrusted to PW. 5. The case of the plaintiff is that before he could actually cancel the Will and divide the property by executing a deed of partition, Kuttappu died. Even then, according to the plaintiff, the will does not survive and he is entitled to a share in the property on the basis that Kultappu died intestate. So he filed the present suit for partition.

3. The plaintiff cited the paternal uncle PW. 5 to produce the will entrusted to him by Kuttappu. The will was produced along with a statement said to have been signed by PW. 5. That statement was marked as Ext. XI. The Will was marked as Ext. X3, PW. 5, in his evidence denied that the Will had been entrusted to him by Kuttappu, after expressing the intention to cancel the same and divide the properties among his children. The statement in Ext. XI purporting to be that of his to the effect that the will was entrusted to him by Kuttappu produced in the Court, was not one really made by him and that he had only signed a blank paper and had given it to the plaintiff. The plaintiff himself was in possession of the will and had produced the same in the Court as if it were produced by PW. 5. P.W. 6 thus denied the case of the plaintiff that Kultappu had told him that he intended to cancel the Will and intended to divide the properties among all his children. PW. 2 and PW. 3, the uncles of the plaintiff and the contesting defendants, attempted to support the case of the plaintiff about the change of mind on the part of Kuttappu regarding the disposition of the properly. To prove the Will, the propounders of the Will examined one of the atteslors as DW. 3 and scribe as DW. 2. DW. 3 spoke to the due execution and attestation of the Will. DW. 2 the scribe deposed to the fact that instructions for the preparation of the Will were given to him by Kuttappu himself. The aspects of the attestation, registration, of the Will and the instruction for the will being given by Kultappu, were not seriously challenged in cross-examination of DWs. 2 and 3. On the basis of the materials on record, the trial Court held that the Will Ext. X3 was duly proved to be the last Will and testament of Kuttappu. The contention of the

plaintiff that Kuttappu intended to revoke the will and the expression of an unequivocal intention to revoke itself would operate as a revocation of the will, was negatived by the trial Court. The trial Court also could "riot find on the evidence that Kuttappu had expressed an unequivocal intention to revoke the Will and in the absence of anything tangible done towards revocation, the plea of revocation cannot be accepted. Thus, the Will was found and consequent on the finding that the property was not a joint family property, the Will was upheld. The plea that the property was a joint family property will be dealt with by me in the later part of this judgment.

4. The lower appellate Court, on a reappraisal of the evidence of PW. 1, PWs. 2 and 3 and PW. 5 and that of DWs. 2 and 3 came to the conclusion that the propounders of the Will have duly proved the Will Ext. X3 and in view of the execution of the Will by Kuttappu, plaintiff was not entitled to any share. The appellate Court also held that there was no evidence of the revocation of the will and there was also no circumstance made out, which made it not possible for the Court to accept the Will as the last Will and testament of Kuttappu. Thus upholding the Will, the claim of the plaintiff for partition was rejected. The lower appellate Court noticed the fact that there was no serious argument before it that the property was joint family property and that the plaintiff was entitled to a share therein, by virtue of his birth, as a member of a joint Hindu family, since it appeared that the position that the law prevalent in that part of the State to the effect that the son was not entitled to any right by birth, was not questioned before that Court and was accepted by counsel for the plaintiff. The question is whether circumstances are made out to interfere with the conclusions arrived at by the lower appellate Court.

5. As regards the nature of the property, both the Courts have found that it has not been established that the plaint schedule properties were acquired, under Exts. B4 to B7 by causing any detriment to any joint family property. The plaintiff relied upon Ext. Al partition of 1115 M. E. to point but that item 14 therein was allotted to Kuttappu in that partition, that Kuttappu had sold that item under Exts. A2 and A4 and purchased another item of property under Ext. A3 of the same year and subsequently he had sold the property covered by Ext. A3 and from the proceeds therein had acquired the plaint schedule properties under Exts. B4 to B7. In the evidence, the plaintiff could not establish that Kuttappu had applied the proceeds of the sale of item 14 in Ext. Al, for the purchase of properties under Exts. B4 to B7. Secondly, under the law governing persons who belong to erstwhile State of Cochin, though the parties were governed by Hindu Law, the son did not acquire any right by birth. Thus the trial Court held that item 14 in Ext. A1 has to be treated as the separate property of Kuttappu and even if the case of the plaintiff that proceeds of the sale of that item were used for the purchase of plaint schedule properties be accepted, the plaintiff could not claim the right in the plaint schedule properties by birth. It is this part of the case that was not seriously pursued before the lower appellate Court as could be seen from the following observations of that Court:--

"As noticed above, the parties are Makkathayam Thiyyas of Cochin area. Relying on a number of decisions of the erstwhile Cochin High Court and the Travancore-Cochin High Court the learned Sub Judge has concluded that an Ezhava son in the Cochin area could not acquire an interest in the ancestral property by birth and that the father had absolute interest in the properties whether acquired by him or obtained in a partition. Learned counsel for the appellant has not seriously challenged this proposition of law. Nothing is pointed out to show that the plaintiff really has acquired a right by birth in the plaint A schedule properties''.

Thereafter, the appellate Court also considered the evidence and found that it has not been shown that the plaint schedule properties are available for partition as joint family properties. Going by the law as referred to by the Courts below governing the parties, and the subsequent conduct referred to and relied by the lower appellate Court, the finding that the plaint schedule properties are not joint family properties in which the plaintiff has acquired a right by birth, is clearly sustainable in law. The finding in that behalf by the Courts below does not suffer from any substantial error of law, warranting interference in this Second Appeal. The case has therefore to proceed on the basis that the plaint schedule properties belonged exclusively to Kuttappu and Kuttappu was competent to deal with the properties by way of testamentary disposition.

6. The question then is whether the finding by the Courts below that the propounders have proved the due execution of Ext. X3 will, calls for any interference in this Second Appeal. I was taken through the evidence of PWs 2, 3 and 5 and also of DWs 2 and 3 and the evidence of PW 1 and DW 1. On going through the evidence, it is clear that the due and valid execution and attestation of the will is clearly established by the evidence of DW 3. The giving of instructions for the preparation of the will by Kuttappu to his son has been established by the evidence of DW 2, the scribe of the will. Nothing has been brought out in the cross-examination of DWs 2 and 3, either as a challenge to the giving of instructions by Kuttappu for the preparation of the will or regarding the elements required, to establish a valid execution and attestation. It is also seen that the will is a registered document which was presented for registration by Kuttappu himself after acknowledging the execution of the document and the will was got back after registration by the first attest or to the will. Registration being a solemn act, there is a presumption as to the regularity of execution of the will and since no vitiating circumstances are made out either to rebut presumption arising out of registration or to throw any doubt on the presence of Kuttappu at the registration of the will. Thus, the finding by the Courts below that Ext. X3 will was the last will validly executed by Kuttappu calls for no interference.

7. In this Court, learned counsel for the plaintiff contended that, on scrutiny of Ext. X3 will, it can be seen that page 3 therein, had not been signed by Kuttappu and this would make the will incomplete and inoperative. According to counsel, the

expression of intention by the testator must be evinced by the testator affixing his signature or mark to each and every page of the will. On a scrutiny of Ext. X3 will, it is seen that Kuttappu has signed the will at the bottom of the will, followed by the attestors. Kuttappu has also affixed his thumb impression and signature before the Registrar for registration, after he presented it himself for registration. Kuttappu has also affixed his signature at pages 1 and 2 of the will. There is an omission on the part of Kuttappu to affix his signature at page 3 of the will, at the place where he was expected to affix his signature. That there is an omission to sign the will at page 3 is also brought out from the evidence of PWs 2 and 3, who were confronted with the will in that regard. The question is whether the fact that Kuttappu failed to sign the will in one of the pages, should lead to a finding that the will cannot be said to be one duly executed by Kuttappu. No decision was brought to my notice in support of the proposition that failure to sign one of the middle pages of the will would make a will incomplete or inoperative. In the Goods of R. Porthouse ILR (1897) 24 Cal 784 it was held that omission of a testator to insert his name and description at the head of the document and to append his signature thereto, would not make the will incomplete, if he had affixed his signature in the attestation clause and completed the disposition clause bequeathing all his properties. The position appears to be that a will is not rendered invalid by the circumstances that the signature is placed among the words of the testamentary clause or the clause of attestation, if the Court is satisfied that the deceased intended by signing his name in attestation clause to execute his will. This position is accepted by the decision of the Punjab High Court in the decision in In re Mahabir Singh, AIR 1963 Punjab 66. Here, in Ext. X3 will, is clearly appended the signature of the testator Kuttappu at the bottom of the will, accepting the bequest made by him earlier and that signature is followed by the signature of the attestors. Pages 1 and 2 of the will are also signed by Kuttappu. There is no case that page 3 of the will to which Kuttappu had not affixed his signature has been substituted for the original or has been tampered with and was not part of the original will. In the absence of any such case, it cannot be held that the Courts below were unjustified in accepting Ext. X3 will as duly executed and complete. Section 63 of the Indian Succession Act also supports this position. Section 63(a) indicates that what is needed is for the attestor to sign or affix his mark to the will or authorise some other person to sign it on his behalf in his presence and at his direction. Section 63(b) indicates that the signature or mark of the attestor shall be so placed that it shall after that it was intended thereby to give effect to it as a will. The signature placed at the end of the will after the schedule of properties set out in the will and the attestation clearly satisfies the requirements of Section 63 of the Indian Succession Act. I have therefore no hesitation in overruling the contention on behalf of the plaintiff that the will could not be accepted since it had not been signed by the testator in page 3 of the will.

8. Then the other question is whether the will can be taken to be revoked by the testator. Section 70 of the Indian Succession Act indicates that there can be a

revocation of an unprivileged will. According to counsel for the plaintiff, here was a case where the testator had clearly evinced his intention to revoke the will and had conveyed that intention to PWs 2 and 3, his brothers-in-law and to PW5, his own brother. According to counsel, the clear intention expressed by the testator to PW5, spoken to by PWs 2 and 3 and supported by PW1, the plaintiff, would be sufficient to bring about a revocation of the will. In Maharajah Pertab Narain Singh v. Maharanee Subhao Kooer (1876-77) 4 Ind App 228, the Privy Council observed:--

"A verbal authority given by a Hindu testator to a third party to destroy his will, although the instrument is not in fact destroyed, is sufficient in law to constitute a revocation". Counsel pointed but that going by this, the statement made by the testator to PW 5 that he iniended to give the properties to all his children and to revoke the will was sufficient to bring about the revocation. I must say that the evidence in this case is hardly sufficient to presume a revocation of the will. PW 5 has repudiated the suggestion on behalf of the plaintiff that any such thing took place. In fact PW 5 said that the will was not entrusted to him by Kuttappu as claimed by the plaintiff. It must be noticed that the plaintiff obtained permission and cross-examined PW 5, whom he had cited as his own witness. A reading of the evidence of PW 5 cannot certainly lead the Court to the conclusion that Kuttappu had expressed an intention to PW 5 to revoke the will. The evidence of PWs 2 and 3 in that behalf was not accepted by the Court below. On going through their evidence, I am also not in a position to find that it will be safe to infer from their evidence, a revocation of the will in the circumstances of the case. The reliance placed on the decision in Pertab Narain Singh, 1876 4 IndApp 228 by teamed counsel for the plaintiff is of no avail in this case, since there is no factual foundation for a finding that Kuttappu had, in fact, expressed an unequivocal intention to revoke the will. In the decision in Sridevi Amma and Others Vs. Venkitaparasurama Ayyan and Others, a Full Bench of this Court had occasion to consider the elements to be proved to infer a revocation of a will in an area to which the Indian Succession Act did not apply. The Full Bench held :--

"No particular formality is necessary under the law in Cochin for revoking the will, except possibly the rule of prudence that when an inference in favour of revocation is asked to be drawn from the conduct of the testator, the conduct must be such as to show that his mind was directed to the question whether the will was to remain in force or not and his conduct proceeded on the footing that the will was no longer to be in force. Therefore, the act of withdrawal of the will by the testator was itself indicative of an animus revocandi thereof. The present is a case to which the Indian Succession Act applies, since the will was executed only in the year 1979 after the extension of the Indian Succession Act to the area in question, by the States Reorganisation Act. Even assuming that Section 70 of the Act did not apply, it has to be held going by the principles laid down by the decision of the Full Bench above referred to, that no interference in favour of a revocation can be drawn in this case by the conduct of the testator. The only conduct projected is an assertion by the

plaintiff that his father told his maternal uncles that he intended to give his properties to all his children, a case which was found to be not acceptable by the Courls below on an appreciation of the evidence of PWs 2, 3 and 5. Going by the tests laid down by the Full Bench, it is not possible to accept the argument by learned counsel for the plaintiff that an intention to revoke has been clearly established in this case, even if that alone were sufficient. In Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and Others, , the Su-. preme Court has held :--

"For proving that the will had been revoked, it has to be shown that the testator had made another will or codicil or by some writing declared his intention to revoke the will. Such a document is required by Section 70 of the Act to be executed in the same manner as a will. Such a revocation can also be proved, as the section lays down, by burning, tearing or otherwise destroying the will by the testator himself or by some other person in his presence and by his direction, thus clearly indicating his intention of revoking the will".

The same view was expressedby this Court in the decision in C.G. David Tharakan Vs. Dr. Mrs. Lily Jacob, though not specifically referring to the decision referred to above, but specifically referring to the decision of the Supreme Court in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, . Obviously, there is no case here of a revocation strictly in terms of Section 70 of the Indian Succession Act. Thus, going by any standards, it cannot be held that the plaintiff has established that the will Ext. X3 was revoked by his father Kuttappu.

In view of the discussion as above and the conclusions arrived at, the substantial questions of law now formulated in the Memorandum of Second Appeal have to be answered against the appellant. Having thus answered the questions, the judgment and decree of the lower appellate Court are confirmed and this Second Appeal is dismissed. Considering the relationship between the parties, I direct the parties to suffer their respective costs in this Court.