(2016) 03 KL CK 0145

High Court Of Kerala

Case No: A.S. No. 528 of 2001

P.C. Sebastian	APPELLANT
Vs	
P.C. Chacko and Others	RESPONDENT

Date of Decision: March 22, 2016

Acts Referred:

- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 100, Section 101, Section 102, Section 103, Section 104, Section 105, Section 106, Section 107, Section 108, Section 109, Section 110, Section 111, Section 120, Section 63, Section

Citation: (2016) 2 KerLJ 368 : (2016) 2 KLT 89

Hon'ble Judges: Antony Dominic and A. Hariprasad, JJ.

Bench: Division Bench

Advocate: S.K. Brahmanandan, Advocate, for the Appellant;

Final Decision: Dismissed

Judgement

A. Hariprasad, J.

1. Maliyekkal Rosamma, ("the testatrix", hereinafter), executed Ext. B3 Will well before her mundane existence ended. What were her intentions at the time of executing Ext. B3? Whom did she intend to benefit ultimately? Was it her husband Chacko @ Kunjacko or her son Sebastian (1st defendant)? Did she intend to confer an absolute right on her husband, including the power to make a testamentary disposition over the property included in Ext. B3 Will? If that be so, was the right given to the 1st defendant, as per Ext. B3, only a chance to succeed? What is the legal effect of Ext. B2 Will, the one executed by husband of the testatrix? Answers to these intricate questions will resolve the issues. Primarily, a proper construction of Ext. B3 is called for in this case.

2. Relevant facts are thus: The suit is for partition of A schedule immovable property and B schedule cash deposits. 1st defendant is the appellant. Plaintiff and other

defendants are the respondents. Plaintiff and defendants are brothers. Admittedly, their mother Rosamma predeceased her husband. Their father Chacko died on 17.06.1997. In the plaint, no mention of Ext. B2 or Ext. B3 has been made. According to the plaint averments, the properties described in plaint A and B schedules belonged to deceased Chacko. After his death, the properties devolved on the plaintiff and defendants as legal heirs. Deceased Chacko did not alienate the property during his life time. The plaintiff, along with each defendant, is entitled to 1/5th share in the properties. The defendants were not prepared to have an amicable partition. Hence the suit.

3. 1st defendant filed a written statement opposing the averments in the plaint. Fact that their mother died earlier than father is admitted. Plaint A schedule property did not belong to their father Chacko. Plaint A schedule property originally belonged to their mother Rosamma. During her life time, she, with full testamentary capacity, executed a registered Will bearing No. 22 of 1988 of SRO, Sreemoolanagaram (Ext. B3). After the death of Chacko, as per the terms of the Will, the property in A schedule devolved on the 1st defendant. Neither the plaintiff nor other defendants have any right over plaint A schedule property. Nevertheless, the 1st defendant sought partition of 1/5th share over the amounts shown in plaint B schedule.

4. 2nd defendant contended that he is the owner of plaint A and B schedule properties. Neither the plaintiff nor other defendants have any right over these properties. Statement in the plaint that deceased Chacko, during his life time, created no document in respect of the properties is false. Deceased Chacko, in a sound disposing state of mind, executed a Will on 24.01.1997 and it was registered as document No. 7 of 1997 of SRO, Sreemoolanagaram (Ext. B2). As per Ext. B2, the property was bequeathed in favour of the 2nd defendant. On the death of their father, the Will came into force and the 2nd defendant became the absolute owner of the property. The suit is liable to be dismissed.

5. We heard Sri. Premachandra Prabhu, learned counsel for the appellant and Sri.Dinesh R. Shenoy, learned counsel for the contesting respondent.

6. Facts, which are established by evidence and therefore remaining undeniable, are that both Exts.B2 and B3 Wills have been proved in accordance with Section 63 of the Indian Succession Act, 1925 (in short, "the Act") and Section 68 of the Indian Evidence Act, 1872. Further, if the 2nd defendant wanted to rely on Ext. B2 Will, necessarily he should have admitted the due execution of Ext. B3 Will by his mother, because then only deceased Chacko could have succeeded to his wife. It also came out in evidence through DW1 that in respect of Ext. B3 Will, a probate proceeding was taken and admittedly a probate was later granted. Besides, Ext. B3 Will was proved through DWs.1 and 5. In fact, the testimony of DW5 remains unchallenged for want of cross-examination. Similarly, Ext. B2 Will also remains proved through DWs.2 to 4. Unchallengeable fact is that both Exts.B2 and B3 Wills have been properly proved. Court below rejected Ext. B3 on noticing that it was a notarized

photo copy of the original Will. It had been satisfactorily explained before the trial court by the propounder of Ext. B3 Will that the original of Ext. B3 Will was produced before the District Court in the probate proceedings. Besides, neither the plaintiff nor any other defendant had challenged the testamentary capacity of Rosamma or due execution of Ext. B3 Will. In addition to that, the execution witness to Ext. B3 was cited and the Will was properly proved. Not only that the 2nd defendant (contesting respondent herein) will have to support the execution of Ext. B3 Will in order to advance his case based on Ext. B2 Will. For the said reasons, we hold that the finding of the court below that Ext. B3 Will was not proved is unsustainable and hence it is vacated.

7. Another startling feature in this case is that now the plaintiff has given up the chase for property. Virtually this is a legal battle between the 1st and 2nd defendants in the suit. Which among the two Wills propounded herein will have a march over the other is the question. In either way, the plaintiff may not succeed.

8. Having found that both Exts.B2 and B3 Wills stand proved by absence of any challenge and also by adducing proper and sufficient evidence, we should venture into the initial task of construing Ext. B3 Will, as that will be determinative for the proper adjudication of this case.

9. Deceased Rosamma, the testatrix, executed Ext. B3 Will on 07.04.1988 and later it was duly registered. It can be seen from the recitals in Ext. B3 that she had settled the property earlier as per another disposition. That was expressly revoked by the terms in Ext. B3. The property included in Ext. B3 was in her possession and ownership. The relevant portion of Ext. B3 is reproduced hereunder in vernacular itself, in order to avoid a possible drain of accuracy on account of translation:

10. From the above excerption, it may appear that the testatrix intended to create an absolute estate in favour of her husband Chacko by the dispositions. It is also mentioned that in case her husband died during her life time, the property would ultimately devolve on the 1st defendant. But, it is an undisputed proposition that the testatrix died first and her husband died only much thereafter. Admittedly, Ext. B3 Will came into effect. Another clause in Ext. B3, which is relevant for our purpose, is extracted hereunder:

11. By virtue of this clause, the testatrix intended to benefit the 1st defendant, if only Chacko succeeded to the estate of the testatrix and if only any property was available after his death. According to the learned counsel for the 1st defendant, prolific and plentiful use of the word in Ext. B3 could only refer to a transaction or

transfer during life time of the owner of property. In other words, the expression occurring at various places in Ext. B3 Will is only indicative of the fact that the testatrix allowed her husband Chacko to transfer the property during his life time and he was incompetent to execute Ext. B2 Will, so as to deviate the course of succession envisaged in Ext. B3 Will. It is a well settled legal proposition that a legatee under a Will also gets property by way of succession and that is called testamentary succession. Catch word calling for interpretation in Ext. B3 is . It can be split into two words, viz., and Literal meaning of the words and has to be considered first. "Sabdhatharavali" is an acclaimed comprehensive dictionary in Malayalam. The word according to means ie., "purchasing for a price". The word means
. So, the word means "trade" or "sale". According to Malayalam-English Dictionary by Dr. Hermman Gundert, the word (krayavikrayam)" means "buying and selling".

12. Learned counsel for the appellant contended that going by the plain meaning ascribed to , it cannot take in a testamentary disposition. Logic of his argument lies in the fact that buying and selling can only take place during the lifetime of buyer and seller, because these two things happen simultaneously. But, in the case of a Will, it comes into effect only on the death of the testator. So, cannot take in a bequest. Per contra, the learned counsel for the contesting respondent contended that the document writers drafting in vernacular do not use words and phrases in accordance with dictionary meanings; instead they use them in a popular sense, which got acceptance by long standing usage. It is also contended that the prevalent practice across the State is to use the expression to connote any sort of a transaction/transfer. If we construe the expression with a restricted meaning that it takes in only transactions inter vivos and it does not take in a testamentary disposition, then the question is whether that construction will be against the intention of the testatrix? It is also contended that the testatrix, having conferred an absolute right on her husband Chacko by the terms in Ext. B3, would not have intended to restrict his power of excluding any testamentary documents.

13. Let us examine the concept of absolute right or title. According to the Black''s Law Dictionary, the expression "title" is the union of all elements (as ownership, possession and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself. The expression "absolute title", according to the Black''s Law Dictionary is an exclusive title to land; a title that excludes all others not compatible with it. Well settled is the proposition that the expression "absolute right" is a bundle of rights. Possession is one of the cardinal elements in the bundle. Right to transfer the property by any means known to law, for example, sale, exchange, lease, mortgage, bequest and other conceivable forms of transfer, is an essential feature of an absolute right. If anyone says that a person, having an absolute right over a property, does not have a power to bequest, then it can only be understood that the title held by him is not absolute, or rather, it is imperfect.

14. Disposition clause in the Will, extracted above, assumes importance in this context. The declaration made by the testatrix in Ext. B3 that
clearly indicate her intention to benefit Chacko by conferring absolute right over the property with unfettered power of alienation. If we read the above clause creating the bequest in favour of Chacko together with the terms conferring a contingent bequest in favour of the 1st defendant, then things will be more clear. In the latter part of Ext. B3 Will, the testatrix has mentioned that the bequest in favour of Chacko with an absolute right over the property would lapse in favour of the 1st defendant, only on one condition that Chacko should not have transferred the property during his life time. Whether the testatrix intended to use the expression in that clause in a restricted sense? Or, did she use the expression at all places in Ext. B3 in the same sense? These are the relevant questions.

15. Now, we shall recapitulate the principles of interpretation of Wills. There are two cardinal principles to be borne-in-mind in the construction of a Will. First one is the rule of law and the second, the rule of construction. A rule of law is one which takes effect when certain conditions are established, albeit the testator might have intended to the contrary. A cardinal principle is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. A rule of construction is one which points out what a court should do in the absence of an express or implied intention. It is a fundamental principle that intestacy is not to be lightly inferred. General principle in the matter of construction of Wills is that technical words or words of known legal import are to be construed as having been used in their technical sense, or according to their strict acceptance, unless the context contains a plain indication to the contrary. Supreme Court in Kasturi v. Ponnammal (, AIR 1961 SC 1302) has laid down the following principles. The rule of construction of Wills is that so far as is reasonably possible, the court should adopt that construction of the Will, which would avoid intestacy. But, it cannot be treated as an absolute rule. If two constructions are reasonably possible and one of them avoids intestacy, while the other involves intestacy, the court would certainly be justified in preferring that construction which avoids intestacy. Another rule propounded therein is that the construction, which postpones the vesting of the estate after the death of the testator should be avoided. This is also subject to the aforementioned condition. The Supreme Court has cautioned that it is obvious that a court cannot embark on the task of construing a Will with a preconceived notion that intestacy must be avoided or vesting must not be postponed. The intention of the testator and the effect of the dispositions contained in the Will must be decided by construing the Will as a whole and giving the relevant clauses in the Will their plain grammatical meaning considered together. It has been emphasised in the decision that a Will must be construed as a whole and the relevant clauses in the Will should be given their plain and grammatical meaning for a proper construction.

16. Parry and Clark on the Law of Succession (8th Edition, page Nos. 402-403) deal with the cardinal principles of interpretation of Will. It is a definite principle that a Will has to be read as a whole and the testator''s intention has to be ascertained from an examination of the whole of his Will. Following quotation from the treatise will be useful:

"..... "The fundamental and overriding duty binding the court is to ascertain the intention of the testator as expressed in his will read as a whole." The testator''s "general" intention, when ascertained with reasonable certainty in this way, "is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in cases of difficulty or ambiguity."

(1) Resolving ambiguity: If the court is faced with a choice between two (or more) possible meanings of an ambiguous word or phrase (e.g. the word "money"), the court determines the meaning intended by the testator by considering all the provisions of the will, construed with the aid of any admissible extrinsic evidence.

(2) Rebutting presumption in favour of ordinary or technical meaning: As already explained, under the dictionary principle the ordinary or technical meaning of a word or phrase may be discarded if it is inconsistent with the testator''s general intention, as expressed in his will read as a whole.

(3) Supplying, omitting or changing words: This general intention may even supply, by implication, words omitted from the will (by, perhaps, the proverbial "blundering attorney''s clerk"). But the court exercises great caution over reading words into a will and only does so if it is clear from the will itself, "from the four corners of the document,"....."

17. Theobald on the Law of Wills (14th edition) also lays down guidelines regarding the general principles of construction of Wills. Learned author has stated that the court cannot rewrite a Will, nor the court can make a guess as to the intention of the testator. It is also mentioned that words used in a Will should be construed in its context. Learned author further says that if the meaning of a word or phrase has changed with the passage of time, it is the ordinary meaning current, when the will was made, which is relevant. Learned author also states about interpretation of words appearing in a Will with both an ordinary and a special meaning. Following quotation will be useful:

"Words with both an ordinary and a special meaning. Sometimes a word or expression has a special meaning in a trade, calling or profession, or a religious sect, or a particular locality, with which the testator is connected: as is explained later, evidence of this special meaning is admissible. If the word or expression has both an ordinary meaning and this special meaning, no prior presumption arises in favour of one or the other, and the court determines the meaning intended by the testator by considering all the provisions of the will in the light of the surrounding

circumstances."

18. Lord Simon L.C. in Perrin v. Morgan ((1943) AC 399) has held that -

"The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case - what are the ''expressed intentions'' of the testator?"

19. The cardinal principle in the interpretation of deeds, that to the extent possible, all clauses in a document should be harmoniously construed so as to give effect to the dispositions, is applicable in the case of Wills too. Certainly, that principle cannot be rigidly applied under all circumstances, ignoring the express or implied intention of the testator.

20. Celebrated rule, called the Arm Chair rule, of interpretation of a Will was first propounded in Boyes v. Cook ((1880) 14 Ch D 53). Following excerption may be profitable:

"You may place yourself, to speak, in (the testator''s) armchair, and consider the circumstances, by which he was surrounded when he made his will, to assist you in arriving at his intention."

This principle was followed in various pronouncements later. (see H. Venkatachala Iyengar v. B.N. Thimmajamma and others (, AIR 1959 SC 443) and other later decisions on the point).

21. To sum up this discussion, the first rule of construction of a Will is that it should be read in its entirety to understand the intention of the testator. Secondly, intestacy shall not be lightly inferred. If two interpretations are possible, the view in favour of testacy should be preferred. Thirdly, in order to resolve any ambiguity, the words used in a Will should be understood with reference to all the provisions in the Will. Fourthly, if occasion so demands, the court should even supply an omission to give effect to the intention of the testator. Fifthly, ordinary or technical meaning of a word or phrase may be discarded, if it is inconsistent with the general intention, as expressed in the Will, read as a whole.

22. With these principles in our mind, we shall construe Ext. B3 Will. In Ext. B3 Will, the testatrix had unequivocally reserved her right to have (transact or transfer) during her life time. The same power has been given to her husband Chacko as per the terms in Ext. B3. Clauses in Ext. B3 clearly indicate that he has been conferred with an absolute right. Again, the testatrix has declared in the Will that if Chacko died during her life time and the bequest in his favour failed to take effect for that reason, then the property would go to the 1st defendant, provided the testatrix did not transfer during her life time. All these aspects put together will indicate that the expression used at various places in Ext. B3 contextually take in all possible

transactions or transfers in respect of an immovable property, including testamentary disposition. Any other interpretation in this context will be illogical and may do violence to the plain language in Ext. B3. Although the phrase may have a shade of meaning as transfer or transaction or alienation inter vivos generally, if that is used in a document whereby an absolute title is conferred on a transferee or legatee, as the case may be, restricting the said expression to inter vivos transfer alone may have the effect of stultifying and/or impeding the absolute title intended to be conveyed. So, we are not prepared to limit the meaning of the expression in Ext. B3 to inter vivos transfers alone.

23. Learned counsel for the appellant contended that the principle in Section 88 of the Act has to be borne-in-mind while interpreting the last clause in Ext. B3, which tends to benefit the 1st defendant. Section 88 of the Act with its illustrations read as follows:

"S.88. The last of two inconsistent clauses prevails- Where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) The testator by the first clause of his will leaves his estate of Ramnagar ''to A,'' and by the last clause of his will leaves it ''to B and not to A.'' B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail."

We are unable to agree with the contention of the appellant that by operation of this provision, the dispositions in Ext. B3 in favour of Chacko could only be treated as a life interest and the ultimate gift was in favour of the 1st defendant. This interpretation, if accepted, will tantamount to negating the clear manifestations of testatrix''s intention.

24. Now, we shall refer to the statutory provisions relevant for the construction of Wills. Chapter 6 of the Act deals with construction of Wills. Sections 74 to 111 are the provisions comprised in this Chapter. Section 74 of the Act says that it is not necessary that any technical words or terms of art be used in a Will, but only that the wording be such that the intentions of the testator should be known therefrom. As mentioned above, axiomatic is the proposition that while construing a Will, an interpretation leading to testacy and not intestacy is to be adopted (see Gnambal Ammal v. Raju Ayyar - , AIR 1951 SC 103 and Kasturi v. Ponnammal - , AIR 1961 SC 1302). In Navneet Lal v. Gokul (, AIR 1976 SC 794), it has been held that where one of two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. This Court in Neettiyath Parukutty Amma v. Puthiyedath Parukutty Amma (, AIR 1999 Ker. 236)

echoed a similar view and further held that even a partial intestacy is to be presumed against. Another view is that if occasion demanded, the court should even supply an omission. This view is in tune with the principles in Section 77 of the Act, wherein it is stated that where any word material to the full expression of the meaning has been omitted, it may be supplied by the context. Section 85 of the Act says that no part of a Will shall be rejected as destitute of meaning, if it is possible to put a reasonable construction upon it. Another important provision in this Chapter of the Act is Section 86. It deals with interpretation of words repeated in different parts of the Will. The Section reads as follows:

"S.86. Interpretation of words repeated in different parts of the Will.--If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears."

The Section is in accord with the ordinary rule of construction that when a word is used in one part of a document with some clear and definite meaning, use of the same word in another part is intended to mean the same thing. In Ext. B3, the word has been used by the testatrix in order to assert her absolute right and to preserve the same, even as an indication of her right to alienate the property. The same expression is used for making the bequest of property to her husband. Clear and unambiguous dispositions are made in Ext. B3 indicating the conferment of absolute title on him. The very same expression is used at a later part of the Will, pointing out that the 1st defendant would have succeeded to the property after the death of Chacko, if he had not done any transaction with respect to the bequeathed property. It can only be construed that at all places in Ext. B3, the expression has been used in the same sense. The said expression is used to proclaim and retain absolute title, insofar as the testatrix is concerned, and to confer a like title on her husband. There is no lack of clarity or obscurity or ambiguity in the terms of dispositions in Ext. B3 Will. After conferring an absolute right on her husband, the testatrix wanted to benefit the 1st defendant by way of a contingent bequest, if anything was left behind after the life of the legatee. It is well settled that the principle in Section 88 of the Act is subject to exceptions. A Division Bench of the Madras High Court in Venkataramayya v. Pitchamma (, AIR 1925 Madras 164) has stated that the latter clause in a Will should be preferred over the earlier, if the earlier clause is not clear and/or ambiguous. Supreme Court in Ramachandra Shenoy v. Mrs. Hilda Brite (, AIR 1964 SC 1323) has held that resort to Section 88 of the Act shall be taken only when there is a conflict between the earlier clause and latter clause in a Will. In otherwords, the rule under Section 88 of the Act shall be invoked only if there is irreconcilability between two dispositions in the Will. These decisions were followed by a learned Single Judge of this Court in Rajan v. Sadanandan (2004 (3) KLT 124). In the case on hand, there is absolutely no inconsistency between the earlier disposition in favour of Chacko, the testatrix''s husband and latter disposition in favour of the 1st defendant. It is definite from the terms of Ext. B3 that the testatrix intended to confer an absolute estate on her

husband by the vesting clause first mentioned. It is mentioned subsequently that in case he died without transferring the property, the 1st defendant could succeed by operation of Ext. B3 Will. First of all, as mentioned above, there is no lack of clarity in the first clause and there is no incongruity between these two clauses. Secondly, the second clause is contingent on the happening of an uncertain event of Chacko leaving behind any property at the time of his death. Section 120 of the Act says that a legacy, bequeathed in case a specified uncertain event shall happen, does not vest until that event happens. Anticipated events, which are not certain to occur, are contingent events. In this case, deceased Chacko executed Ext. B2 Will during his life time and thereby exercised his right to deal with the property in the manner he pleased. The argument of the appellant that deceased Chacko had no right to make a testamentary disposition of the property in favour of the 2nd defendant is on the premise that he had only a life estate as per the terms in Ext. B3 Will. As mentioned above, the phraseology in Ext. B3 Will makes it clear that deceased Chacko derived absolute title over the property. Therefore, his right to deal with the property in any manner, including by way of a testamentary disposition, during his life time, has to be recognized. Viewing from any angle, it can only be seen that the bequest in favour of the 1st defendant in Ext. B3 Will is a contingent bequest, which failed for obvious reasons. For the above said reasons too, we are of the view that the contentions of the appellant that deceased Chacko had no authority as per Ext. B3 to execute Ext. B2, that the last clause in Ext. B3 entitling him to claim property became operative and that the 2nd defendant, by virtue of Ext. B2 Will did not get property are legally unacceptable and hence we reject them.

25. Upshot of the above discussions lead us to an irresistible conclusion that by operation of Ext. B3 Will deceased Chacko became the absolute owner of the property and he wielded all the powers for enjoying property, including the testamentary capacity. Ext. B2 Will in favour of the 2nd defendant, which remains unchallenged and proved according to law, has taken effect. Corollary, therefore, is that the finding of the trial court that plaint A schedule property exclusively belongs to the 2nd defendant is to be upheld. We do so, notwithstanding the fact that we are not in agreement with the reasons stated by the court below for arriving at the conclusion. Court below rightly allowed partition of plaint B schedule items. We affirm the same also, as those items are partible estate devolved on the parties to the suit subsequent to the death of their father.

For the said reasons, we confirm the judgment and decree of the court below and dismiss the appeal. Considering the relationship between the parties, there is no order as to costs.

All pending interlocutory applications will stand dismissed.