

Susheela Vs. Deepika

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Court : Kerala

Decided On : Feb-04-2014

Judge : Honourable Mr. Justice a.Muhamed Mustaque

Appellant : Susheela

Respondent : Deepika

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE TUESDAY, THE 4TH DAY OF FEBRUARY 2014 15TH MAGHA, 1935 OP(C).No. 3772 of 2012 (O) ----- I.A.NO.6923/2010 IN OS.NO. 530/2010 OF 1ST ADDL.SUB COURT, ERNAKULAM ----- PETITIONER/PLAINTIFF: ----- SUSHEELA, S/O. VALLIKUTTY, AGED 86 YEARS, RESIDING AT ASWATHY, KARATHATTUPARAMBU, O.K. MADHAVIAMMA ROAD, THRIKKANARVATTOM DESOM, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM. BY ADVS.SRI.K.R.VINOD SRI. T.S.SUMESH RESPONDENT(S)/DEFENDANTS: ----- 1. DEEPIKA, W/O. LATE N.V.MAHADEVAN, AGED 47 YEARS, RESIDING AT ASWATHY, KARATHATTUPARAMBU, O.K.MADHAVIAMMA ROAD, THRIKKANARVATTOM DESOM, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM-682 018.

2. DEEPU, S/O. LATE N.V.MAHADEVAN, AGED 47 YEARS, RESIDING AT ASWATHY, KARATHATTUPARAMBU, O.K.MADHAVIAMMA ROAD, THRIKKANARVATTOM DESOM, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM-682 018.

3. DARSHAN, S/O. LATE N.V.MAHADEVAN, AGED 47 YEARS, RESIDING AT ASWATHY, KARATHATTUPARAMBU, O.K.MADHAVIAMMA ROAD, THRIKKANARVATTOM DESOM, ERNAKULAM VILLAGE, KANAYANNOOR TALUK, ERNAKULAM-682 018. BY ADV. SRI.N.C.JOSEPH THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 04-02-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: sts OP(C) NO. 3772/2012 APPENDIX PETITIONER(S) EXHIBITS EXT.P1 (THE PHOTOCOPY OF THE PLAINT IN O.S. NO. 530/10 ON THE FILES OF 1ST ADDL. SUB COURT, ERNAKULAM) EXT.P2 (PHOTOCOPY OF THE I.A. NO. 6923/10 THE PETITION FILED UNDER SECTION 45 OF THE EVIDENCE ACT) EXT.P3 (THE CARBON COPY OF THE

ORDER

DATED 8-12-2011 OF SUB COURT, ERNAKULAM.) RESPONDENTS' EXHIBITS : NIL /TRUE COPY/ P.S.TO.JUDGE sts A.MUHAMED MUSTAQUE, J.

~~~~~ O.P.(C) No. 3772 of 2012 "C.R"  
~~~~~ Dated this the 4 day of February, 2014 th

JUDGMENT

The plaintiff, in a suit for partition, filed an application to send the "will" set up in defence for examination by an expert to substantiate his allegations in the rejoinder filed. Admittedly the plaintiff schedule property belonged to late Madhavan. The defendant in the written statement contended that Madhavan had executed a "will" bequeathing the plaintiff schedule property in his favour. In answer to the said defence, the plaintiff filed the rejoinder challenging the execution of the "will". The plaintiff also disputed the signature of the testator found in the "will" and, inter alia, contended that the signature is a forged one. The application has been dismissed by the court below relying on the decision in R.Saraswathy Vs. Bhavathy Ammal & another [1988 (2) KLT 736] holding that opinion of the expert as to the identity of the

signature is not a relevant fact. Challenging the said order the plaintiff filed this original petition under Article 227 of the Constitution of India.

2. Heard the learned counsel for the petitioner and the learned counsel for the respondents. O.P.(C).No.3772/2012 -:2:- 3. The learned counsel for the petitioner, relying on the decision of the Division Bench of this Court in Sumangala T.Pai Vs. Sundaresa Pai [1991 (1) KLT246, submits that if there is anything suspicious in the signature, evidence of an attester of the "will" can be contradicted by an expert opinion. In fact, in the above said decision, the Division Bench of this Court disagreed with the view taken in Saraswathy's case (Supra). However, this Court notice that above Division Bench decision had been reversed by the Hon'ble Supreme Court as per the decision reported in Sundaresa Pai vs. Sumangala T.Pai [2002 (1) KLT32SC)]. In this case, in the rejoinder filed by the petitioner, (copy of which was made available during arguments) and in the application for sending the "will" for expert opinion, the plaintiff specifically alleged that the signature of Late Mahadevan found in the "will" was forged one. The plaintiff in the application to send the "will" for expert opinion has also averred that there is a considerable difference in the signatures of late Mahadevan seen in the disputed "will", when compared to Exhibit A2 and Exhibit B11. The Hon'ble Supreme Court in H.Venkitachala Iyengar V.Thimmajamma and O.P.(C).No.3772/2012 -:3:- others [AIR 1959 SC443 after referring to Sections 45, 47, 67 and 68 of the Evidence Act held in paragraph 18 as follows: ".....What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S.67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence

until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law....." (emphasis supplied) O.P.(C).No.3772/2012 -:4:- 4. When a party to a suit alleges existence of certain facts, the court can draw no inference of its existence unless it is proved through the manner in which the Evidence Act is envisaged. Sections 45 to 47 provide that opinion of the handwriting expert is a relevant fact. Therefore, such evidence may be relevant to prove the allegation regarding suspicious circumstances surrounding the execution of the "will". Therefore, the court shall not preclude a party from adducing any evidence which may be relevant in accordance with the Evidence Act to prove his case. It is premature at a stage when the court is not called upon to determine the "fact in issue" to hold that such evidence is not relevant fact. At that such stage, the court is only concerned with the admissibility of such evidence, but not the relevancy of fact. Relevant fact is determinable sometime along with other inferences to explain the probability of the fact in issue. In this case, only after obtaining the report from the expert, the court can form an opinion whether it is relevant or not.

5. Section 63 of the Indian Succession Act lays down the mode and manner in which an unprivileged "will" is to be executed. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution O.P.(C).No.3772/2012 -:5:- of document is required by law to be attested. It in unequivocal terms states that execution of "will" must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. Though the proof of execution of the "will" in terms of Section 63 of the Succession Act and Sections 67 and 68 of the Evidence Act would be a pre-requisite, but to take the same in evidence while arriving at a finding as to whether the "will" has been duly executed or not the court must satisfy its conscience having regard to the totality of the circumstance. Compliance with statutory requirements itself is not sufficient. Where there are suspicious circumstances, the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last "will" of the testator. Thus, hand writing expert's evidence may become relevant if it establishes any factors explaining the suspicious circumstances including forgery

of signature, if any. Thus, the court below committed serious jurisdictional illegality by dismissing the application to send the "will" for expert opinion.

6. The learned counsel appearing for the defendants submits that the application has been filed by the plaintiff only after the closure of evidence. O.P.(C).No.3772/2012 -:6:- It is true, the plaintiff could have taken steps at the earliest point of time to send the "will" for expert opinion but, delay on the part of plaintiff will not cause any serious prejudice to the defendants if their interest is otherwise safeguarded by giving an opportunity to them to adduce further evidence, if necessary, to explain any matter touching upon the report of expert.

7. In the light of discussion as above and in the light of judgment of the Hon'ble Supreme Court in H.Venkitachala Iyengar 's case [supra], Ext P3 order is liable to set aside.

8. This Court while exercising its jurisdiction under Article 227 of the Constitution of India can interfere with orders passed by the courts below, if such orders are against established principles of law and also when grave injustice is done to a party. In this case, shutting out evidence sought to be adduced, warrants interference invoking the power of superintendence. Therefore, this original petition is allowed. Resultantly, following directions are issued: i). The order (Ext.P3) is set aside and application to send "will" for expert opinion filed by the plaintiff stands allowed. O.P.(C).No.3772/2012 -:7:- ii). The court below shall take necessary steps to send "will" produced by the defendants for expert opinion. iii). The court below shall give sufficient opportunity to defendants to adduce further evidence, if necessary, touching upon the expert opinion. iv). The court below shall dispose the suit on merits uninfluenced by any observation made herein while determining the validity of the "will". No order as to costs Sd/- A.MUHAMED MUSTAQUE, JUDGE ms

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