Simon Vs. George

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SooperKanoon Citation : sooperkanoon.com/718845

Court : Kerala

Decided On : Jan-06-2003

Reported in : 2003(1)KLT718

Judge : K.A. Abdul Gafoor and; K. Thankappan, JJ.

Acts : Evidence Act, 1872 - Sections 68 and 69

Appeal No. : M.F.A. No. 1172 of 1995

Appellant : Simon

Respondent : George

Advocate for Def. : P.V. Chandramohan and; C.K. Simson, Advs.

Advocate for Pet/Ap. : N. Subramoniam and; M.S. Narayanan, Advs.

Disposition : Appeal dismissed

Judgement :

K.A. Abdul Gafoor, J.

1. The appellant applied under Section 276 of the Indian Succession Act to probate the Will executed by his father and mother jointly. That was contested by the first respondent. Thereupon it was converted as a suit. The suit was dismissed on the ground that the appellant failed to prove the Will satisfying the requirements

in Sections 68 and 69 of the Indian Evidence Act. That finding is assailed in this appeal.

2. The appellant gave evidence as P.W. 1 We have gone through his evidence. He had never stated in his evidence that he did know the signature of the testator or that of the attestors to the said Will or that he had familiarity with their signatures. Even though, according to him the attesters hailed from the same locality, without examining any one of them, he closed his evidence. At the time of arguments before the court below, it was pointed out on behalf of the first respondent that the Will was not properly proved by examining the attesting witnesses. Finding that this was a lacuna, the appellant attempted to reopen the matter by filing an application to cite a witness who had been acquainted with the signature and handwriting of the testators as well as the attesters, as the attesters were no more. On terms, the application was allowed. It was thereupon PW.2 was summoned and examined. P.W.2 said that he knew the testators, one Cherappan Vaidyar and his wife Thanda and that the signatures in the Will are their signatures. He also stated that Vaidyar had told him about the execution of the Will. He identified their signatures. There is eloquent silence in his version about his familiarity with the attesting witnesses or their handwriting or signatures, which is mandatory in terms of Section 69 of the Indian Evidence Act, 1872, when the attesters were not alive at the time when the Will was to be proved.

3. Section 68 makes it clear that it was mandatory, in the case of a Will, to prove it by examining at least one attesting witness. In the absence of such evidence it must be proved that the attestation of one of the attesting witnesses at least is in the handwriting and the signature of that person and that the signature of the person executing the document is in the handwriting of that person. Therefore, it was incumbent to prove that there was proper attestation by an attesting witness at least. Unfortunately, no such aspect was elicited from P.W. 2 and there was no whisper about the attestation or the familiarity of the signatures or handwriting of attesting witnesses. In the absence of evidence with regard to the attestation or the attesting witnesses, necessarily, the trial court cannot, but hold that the Will was not been proved, with the rigorous burden cast on the appellant in terms of Section 68 or 69. So long as there is no such proof in terms of statute, we cannot

find fault with the court below in dismissing the suit.

4. Of course, the appellant attempted to substantiate his case contending that the registration itself is sufficient to indicate that the Will has been executed for that purpose. The decisions reported in Varghese v. Oommen (1994 (2) KLT 620) and Irudayam Ammal v. Salayath Mary (AIR 1973 Mad. 421) had been relied on. True, the receipt of registration or certificate from the Registrar is sufficient to indicate that a document has been properly executed and registered. It can only be in respect of a Will which has been duly proved as provided either under Section 68 or 69 of the Evidence Act in the absence of proof in terms of mandatory statutory requirements, it cannot be taken that the Will has been proved. The former among the cited cases is not, therefore, an authority. In the other case cited, two persons had signed, though not as attesters; they were taken as the attesters and Will has been taken as duly proved. It was in spite of that, relevance of certificate of registration was referred to. That is, thus a case where there was proof in terms of Section 68 itself. In this case, no such evidence is forthcoming. So the decisions cited cannot be applied to the fact frame of this case.

Appeal fails and is dismissed. No costs.