Mathew Vs. Devassykutty and ors.

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SooperKanoon Citation : sooperkanoon.com/720776

Court : Kerala

Decided On : Oct-20-1987

Reported in : AIR1988Ker315

Judge : T. Kochu Thommen and; K.P. Radhakrishna Menon, JJ.

Acts : Succession Act, 1925 - Sections 59, 74 and 276; Evidence Act, 1872 - Sections 68 and 71;

Appeal No. : A.S. No. 334 of 1981

Appellant : Mathew

Respondent : Devassykutty and ors.

Advocate for Def. : George K. Varghese, Adv.

Advocate for Pet/Ap. : T.S. Venkiteswara Iyer,; P.K. Balasubramanyan and; S.V.

Disposition : Appeal dismissed

Judgement :

Thommen, J.

1. The appellant is the defendant in a suit for grant of letters of administration. Plaintiffs 1 to 3 and the defendant are the children of the deceased Poranchu and his wife the 4th plaintiff. According to the plaintiffs-respondents, the deceased left

a Will Ext. A1 dt. 1-9-1975 devising in favour of the plaintiffs his entire estate. On the basis of the Will, the plaintiffs filed petition under Section 276 of the Succession Act, 1925 for the grant of letters of administration. The defendant filed a caveat opposing the petition. The proceeding was converted into an original suit. The defendant-appellant contended that the will was invalid as the testator lacked testamentary capacity at the time of the alleged execution of the Will. The learned Judge, on consideration of the evidence, held that the testator had the necessary testamentary capacity at the time of the execution of the Will and the Will was, therefore, valid.

2. Counsel for the appellant, Shri. P. K., Balasubramanyan, submits that the evidence on record, particularly the testimony of the doctor (DW 1), would indicate that the testator did not have the mental capacity to execute the Will and the Will relied on by the plaintiffs is, therefore, not valid. Counsel further says that no person in full possession of his mental capacity would have reasonably disinherited his eldest son, as the testator has done in the case of the defendant. Nothing has been left in favour of the defendant under the Will, counsel submits.

3. Counsel for the respondents, Shri. George K. Varghese, points out that the Will clearly indicates why no bequest was made in favour of the defendant. The defendant had been already well provided for by the testator by transfer of properties to the defendant's son. The extent of the properties so transferred prior to the execution of the Will did not justify any further transfer by bequest in his favour. Further more the Will shows that the first plaintiff (the second son) had paid off debts incurred by the defendant (the first son) and that had been taken note of by the testator. Furthermore, the extent of the bequest made in favour of the plaintiffs, namely, the second son, the two daughtersand the wife shows that what each of them received under the Will was less than what the defendant himself had received under transfers made by the testator in favour of the defendant's son. Counsel then refers to the testimony of the doctor as well as that of the Sub Registrar and others and contends that, as correctly found by the court below, the testator was in full possession of his mental faculties and that he executed the Will fully conscious of what he was doing. There is force in these submissions.

4. Dr. C. K. Eapen was examined as DW 1. He was in charge of the cardiology section of the hospital where the testator was* undergoing treatment for the cardiac problem to which he finally succumbed. The doctor says that the patient regained consciousness about an hour after he was admitted to the hospital on 31-8-1975. He was in the intensive care unit. The treatment made the patient drowsy, but he was fully conscious. He had full mental capacity for 'intellectual works. The doctor says 'he was in control of his higher faculties'. The evidence of the doctor, read as a whole, indicates categorically that at all material times, especially at the time of instructing the preparation of the Will and later at the time of the execution and registration of the Will on the afternoon of 1 -9-1975, despite the treatment and the heart condition, the testator was in full possession of his faculties and was fully conscious of the nature, significance and consequence of what he was doing.

5. The evidence of the doctor is fully supported by the Sub Registrar who testified as PW 1. The witness says that he was summoned to the hospital on 1-9-1975 at about 5.10 p.m. to register the Will. The testator made a statement, marked as Ext. A2, before him to the effect that he was well aware of the contents and significance of the Will which he executed on his own volition and the registration of which he sought. PW 1 thus fully supported the plaintiffs' case in regard to the testamentary capacity of the testator,

6. PW 2 is one of the attestors. He categorically asserts that he and the other attesting witness (DW 2) attested the Will in the presence of the testator at the hospital.He further says that he saw the testator signing the Will. On this crucial aspect of his testimony, there is no cross-examination. We refer to this significant fact because DW 2, who is the other attesting witness, did not apparently support the plaintiffs' case on the question of attestation by him in the presence of the testator. According to DW 2, he had already attested the will in the office of the scribe. His evidence is clearly contradicted by PW 2. Nevertheless. PW 2 was not significantly cross-examined on the point.

7. PW 3 is a priest who runs a hospital called Pius XII where the testator had been admitted with chest complaints. As his condition appeared to be serious, he was

discharged to be removed to the Little Flower Hospital Ankamaly where he died. The priest says that he knew the testator well and that he went to the Little Flower Hospital to meet him. On his way, he heard of the Will. He met the testator between 4 and 5 P.M. on 1-9-1975, which was shortly after the execution, but before the registration, of the Will. The testator told him that he had made arrangements for his family, apparently implying that he had prepared a Will. The witness further says that he heard the confession of the testator, indicating that the testator was fully conscious at the time.

8. PW 5 is the first plaintiff, namely, the second son. He says that he was at his place of work till about 6 P.M. on the date on which the Will was executed. He rushed to the hospital hearing of his father's physical condition. He was then informed of the Will of his father. He says in chief-examination that before the Will the testator had given the defendant some properties. (Matter in vernacular omitted...Ed.). He further says that the testator transferred under a document more than an acre to the son of the defendant. Significantly, the witness was not cross-examined on the point. We refer to this fact because this testimony is well supported by other evidence that the son of the defendant had already received some properties from the testator. Considering the extent of what the defendant had in effect received under transfer by the testator to the defendant's son, in comparison to what each of theplaintiffs received under the Will, the defendant was, in our view, amply and generously taken care of by his father.

9. We have carefully gone through the evidence of DW 2 who is one of the attesting witnesses as well as that of DW4, the defendant. We are not, impressed by the testimony of either of them. We are satisfied that the learned Judge was right when he said that, on appreciation of the evidence as a whole, both the attesting witnesses attested the document in the presence of the testator and that they saw the testator executing the document. We are satisfied that the learned Judge was justified in placing no reliance upon the testimony of DW 2 on the point. He rightly placed no reliance on the testimony of DW 4 either.

10. Counsel for the respondents refers to the principle stated by a Constitution Bench of the Supreme Court in Naresh Charan v. Paresh Charan, AIR 1955 SC

363. Speaking for the Bench VenkataramaAyyar.J. stated :

'.....It cannot be laid down as a matterof law that because the witnesses did not state in examination-in-chief that they signed the Will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence.

This principle had been adopted by the Calcutta High Court as early as in 1916. The Court stated in Brahmadat Tewari v. Chaudan Bibi, AIR 1916 Cal 374:

'.....The principle is well settled that whenthe evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of statute were complied with, in other words, the Court may on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are willfully misleading the Court,and accordingly disregard their testimony and pronounce in favour of the Will..... .....It is not necessary, however, thataffirmative evidence should be forthcoming that the testator did, as a matter of fact, see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively, or as Walde, J. said In re Trimnell, (1865) II Jur (N.S.) 248, the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names Newton and Thomas v. Clarke. (1839) 2 Curt 320. In cases of this description, as was pointed by this Court in Sibo Sundari Debi v. Hemangini Debi. (1900) 4 Cal WN 204, on the authority of Wright v. Sanderson, Sanderson. In re (1884) 9 PC 149: 53 LJP 49, every presumption will be made in favour of due execution and attestation in the case ot a Will regular on the face of it and apparently duly executed.'

In Manindra Nath Ganguli v. Durga Chatan Ganguli, ILR (1949) 1 Cal 471, the Calcutta High Court stated :

'..... The question, therefore, ariseswhether the probate Court is entitled to hold in favour of the Will where the attesting witnesses or some of them prove hostile. In our opinion, Courts are not powerless in those circumstances and a probate Court may pronounce in favour of the validity of the Will from the circumstances of the case taken as a whole. The leading decision on this point is the decision in the case of Wright v. Sanderson. (1884) 9 PD 149. 163.....'

These passages were cited with approval by a Division Bench of this Court in Anoop Varghese v. Poulose. 1974 Ker LT 873 : (AIR 1975 Ker 141). This Court stated :

'.....when the Court is satisfied as in this case that the witnesses deliberately and falsely denied that they attested the Will, the Court is entitled to look into the other circumstances and the regularity of the Will on the face of it and come to the conclusion on the question of attestation.....

Jarman on Wills. Vol. 17th Edit., p. 53 says :

'II.-- Insanity. Weakness of Mind, etc. --The general rule is that the onus probundi lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator'. Barry v. Butlin. (1838) 2 Moo PC 480. But if a Will is rational on the faee of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid.

It is stated in Theobald on Wills. 14th Edn.. p. 30 :

'In order to have testamentary capacity a testator must understand :

(i) the effect of his wishes being carried out put his death, though it is not necessary that he should view his Will with the eye of a lawyer and comprehend its provisions in their legalform:

(ii) the extent of the properly of which he is disposing: and

(iii) the nature of the claims on him. The testator must have a memory to recall the several persons who may be fit ting objects of the testator's bounty, and an

understanding to comprehend their relationship to himself and their claims upon him' Boughton v. Knight. (1873) 3 P and D 64, 65-66.....'

It is further stated by the learned author that the time for satisfying this test is the time when the testator executed the Will. Alternatively, it suffices if the testator had the capacity at the time when he gave instructions for the preparation of the Will, provided the Will was prepared in accordance with such instructions and that, at the time of execution, the testator was capable of understanding and did understand that he was executing the Will prepared in accordance with his instructions. The learned author says:

'If a duly executed Will is rational on the face of it a presumtion arises that the testator had testamentary capacity. ...,....'

11. These tests, as seen from the evidence, are amply satisfied. The testimony of the attesting witness PW 2, the Sub-Registrar PW 1, the doctor DW 1 and other witnesses clearly shows hat at the time of the executionof the Will as well as at the time of giving instructions-in regard to the Will and the registration of the Will and at all other matched times, the testator hud full testamentary capacity in so far as he understood the nature of his act the extent and other details of the property which he disposed and the persons who were the objects of his bounty and their relationship to himself and their claims upon him. He knew full well and fully approved of the contents of his Will. The Will was indeed the result of his own intelligence and volition.

12. Considering the various circumstances of this case, particularly the fact that the testator, being well aware of the seriousness of his cardiac problem, executed a Will at a time when he was fully conscious of what he was doing, and of the earlier transfer of properties to the defendant's son and of the melancholy fact that one of his daughters was deaf and dumb and the other daughter lived far away as a nun in a com cut abroad and his own wife was about to be left behind, the Will on the face of it, appears to us to be a rational and reasonable settlement of properties on the testator's wile and children. Ungratefully, the defendant questions me generosity of his father. We see no merit in this appeal. It is dismissed with costs throughout.