

Manni and ors. Vs. Paru and ors.

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Court : Kerala

Decided On : Oct-01-1959

Reported in : AIR1962Ker195

Judge : M.S. Menon and; S. Velu Pillai, JJ.

Acts : [Evidence Act, 1872](#) - Sections 5 and 101 to 104

Appeal No. : A.S. No. 86 of 1955 (M)

Appellant : Manni and ors.;paru and ors.

Respondent : Paru and ors.;manni and ors.

Advocate for Pet/Ap. : K.V. Surianarayana Iyer, Adv. General,; M.K. Nambiar,; C

Disposition : Appeal allowed

Judgement :

M.S. Menon, J.

1. This is an appeal by defendants 2 to 6 and 8 in O. S. No. 6 of 1952 of the court of the Subordinate Judge of Tellicherry. The only question that arises for consideration is whether the plaintiffs are entitled to benefit under the will Ext. A1 dated 11-10-1949.

2. The testator was one Kunker who died on 5-9-1951. He had eight children, two sons (the deceased Pokkan and the 1st defendant) and six daughters (defendants 2 to 7). By his will he allotted properties to his eight children and the 8th defendant, a nephew of his and the husband of the 3rd defendant.

3. Pokkan committed suicide on 5-9-1951. The 1st plaintiff is his widow and the remaining plaintiffs, plaintiffs 2 to 4 are their children.

4. The lower court held:

'In the result the suit is decreed, declaring the rights of the plaintiffs to the share of Pokkan, allotted to him under the will evidenced by Exhibit A1.'

It is the correctness of this conclusion that is challenged before us.

5. According to the defendants, Kunker met his death at the hands of Pokkan, and the plaintiffs have apparently fought the case on that basis in the court below. The opening sentence of paragraph 11 of the judgment under appeal is:

'It has not been controverted with any seriousness that Kunker died at the hands of his son Pokkarj, who appears to have committed suicide after the crime.'

And the concluding sentences of that paragraph are:

'It is not denied that Kunker died at the hands of Pokkan. The plaintiffs have proceeded on this assumption and the evidence on record warrants taking the view that the death was caused to Kunker by violence at the hands of Pokkan. This issue is answered thus.'

6. According to counsel for the respondents, the evidence on record is not sufficient to establish that Pokkan was guilty of patricide. He emphasised the fact that there were two eye-witnesses to the occurrence, defendants 2 and 7, and that of those, only one has been examined in the case.

7. The evidence of the 7th defendant as Dw. 1 reads as follows:

'As I was talking Pokkan stood up and inflicted stab injuries on father. Shortly before that Pokkan asked me to fetch fire to light beedi. I asked Nani to fetch the fire which she brought and left to kitchen. Pokkan smoked twice and then opened the penknife he had in hand and stabbed my father at the neck twice. I ran away out of fright shouting that my father was stabbed. 2nd defendant also followed me. As I passed the tea shop shouting, I told 1st defendant and others who had gone to take tea, about the crime. I then went to' Adhigari who resides about 1/2 a mile away from our house. I made statement before Adhigari. He recorded my statement and obtained my signature. This statement was made shortly after occurrence.'

8. We are not satisfied that the non-examination of the 2nd defendant should in any way affect the acceptance of the testimony of Dw. 1. The clear and categorical character of the narrative, the admitted suicide of Pokkan on 5-9-1951, for no apparent reason but for fear of repentance. and the corroboration afforded by the statement to the Adhigari immediately after the incident and the evidence of Dws. 5 and 6 definitely support the correctness of her statement.

9. Counsel, for the respondents also drew our attention to the fact that Dw. 1's testimony regarding the execution of an alleged will of Kunker dated 4-9-1951 (Ext. B3) has been disbelieved by the court below. As pointed out by the Supreme Court in Nisar Ali v. State of Uttar Pradesh, (S) AIR 1957 SC 366, the maxim *falsus in uno falsus in omnibus* does not occupy the status of a rule, of law and is merely a rule of caution, and with due deference to the caution administered by the maxim, we are still of the opinion that the evidence of Dw. 1 regarding the death of her father is true in substance and in detail, and that it should be accepted.

10. Pw. 2 is the Inspector of Police who investigated the case. On 15-9-1951, after the completion of the enquiry, he wrote as follows to the Stationary Sub-Magistrate. Badagara:

'Investigation in the above case disclosed that accused Chettianveetil Pokkan caused the death of his father Chettianveetil Kunker on 5-9-51 in Narippata amsom by stabbing him with a penknife and subsequently committed suicide by

cutting open the carotid artery on the light neck. The inquest report and the blood-stained knife have been already sent to Court. The P. M. Certificates are enclosed. The charge in this case therefore abates. Proceedings may kindly be passed.' (Ext. A2).

A careful perusal of the evidence adduced before the trial court shows that the report embodies a correct appraisal of the facts disclosed.

11. In re: Grosvenor Peacey v. Grosvenor, (1944) 1 All E. R. 81 Lord Goddard said:

'It is undoubted law that in civil proceedings a finding can and may be rested on the probabilities of the case'.

In this case whether the degree of proof required is only that or greater, there can be no doubt that Kunker died at the hands of Pokkan.

12. It is settled law that a murderer is not entitled to succeed to the estate of his victim, that a man cannot slay his benefactor and sustain his bounty. It is equally clear that no title to the estate of the person murdered can be claimed through the murderer, that the murderer cannot be regarded as a fresh stock of descent. Lord Philimore stated the propositions, as follows in *Kenchawa Sanyellappa v. Girimallappa*, AIR 1924 PC 209:

'Before this Board, it has been contended that the matter is governed by Hindu law, and that the Hindu law makes no provision disqualifying a murderer from succeeding to the estate of his victim and therefore it must be taken that according to this law he can succeed, and he being alive, the plaintiff has no title.

Their Lordships do not take this view. There is much to be said for the argument of the Subordinate Judge that the principles of jurisprudence which can be traced in Hindu law, would warrant an inference that according to that law a man cannot take advantage of his own wrong, and that if this case had come under consideration by the Hindu sages they would have determined it against the murderer. But it is unnecessary so to decide, because the alternative is between the Hindu law being as above stated or being for this purpose non-existent, and in

this latter case the High Court have rightly, decided that the principles of equity, justice and good conscience exclude the murderer.';

and

'The second question to be decided is whether title can be claimed through the murderer. If this were so, the defendants as the murderer's sisters, would take precedence of the plaintiff, his cousin. In this matter also their Lordships are of opinion that the Courts below were right. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent.'

13. If Pokkan could not inherit or form the stock for a fresh line of descent, then the only further question that arises for consideration is whether the respondents can claim directly from Kunker on the basis of the following provision in Ext. A1. (original in Malayalam).

14. According to the respondents, if this, provision is attracted, they get property not through Pokkan but directly from Kunker and Pokkan's patricide will not affect their claim. According to the appellants even if the clause is attracted, the respondents still come in only as the representatives of Pokkan and that being impossible under the law, their claim will have to be negated.

15. We consider it unnecessary to deal with the controversy. In order to attract the provision, Kunker must have survived his son and that is a fact which, has not been established in this case. The evidence on record is inadequate to come to a conclusion, and the burden of proof is definitely on the party asserting survival.

16. Under the English law, prior to its modification by Section 184 of the Law of Property Act, 1925, 'the onus probandi lay on the party asserting survival, concurrent decease or predecease' (Halsbury's Laws of England, 3rd Edition, Vol. 6, page 193). In *Hickman v. Peacey*. (1945) 2 All E. R. 215, Lord Simonds summed up the position under the Common Law as follows;

'Survivorship was a fact to be proved like any other fact. There was no presumption of it founded on age or sex or any other factor. So also there was no presumption of death at the same time, This was the sum of law on this question.'

The approach of the Common Law is in consonance with justice and common sense and we see no reason why it should not be adopted.

17. Counsel for the respondents submitted that his clients can claim directly under Kunker, quite apart from Ext. A 1, under their personal law, This is a contention which has not been raised in the plaint.

18. The evidence of the 1st plaintiff as P. W. 1 as to the personal law of the parties is:

'I follow Marumakkathayam. My husband followed Makkathayam.'

The right to intestate succession has hence to be resolved under Chapter IV of the Madras Marumakkathayam Act, 1932, The provisions of that Chapter make it quite clear that the contention cannot be sustained.

19. It follows that the appeal has to be allowed and we do so, though in the circumstances of the case with the direction that the parties shall bear their respective costs both here and in the court below.

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