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Kathrikutty Vs. Pappoo

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Court : Kerala

Decided On : Mar-15-2005

Reported in : 2005(3)KLT63

Judge : K.A. Abdul Gafoor and; M. Sasidharan Nambiar, JJ.

Acts : Indian Succession Act, 1925 - Sections 63, 70 and 118; ;Evidence Act, 1872 - Sections 68

Appeal No. : M.F.A. Nos. 1054 and 1055/94

Appellant : Kathrikutty

Respondent : Pappoo

Advocate for Def. : K.C. John and; S. Venkatasubramonia Iyer, Sr. Advs.,; K.

Advocate for Pet/Ap. : T.R. Ravi,; Roy Chacko and; P.S. George, Advs.

Disposition : Appeal dismissed

Judgement :

K.A. Abdul Gafoor, J.

1. These appeals are directed against the judgment in O.S.No. 1/84 granting probate at the instance of the first respondent in respect of Ext.A1 and A2 wills executed by one Mathew J. Kollamparambil. The facts of the case are as follows:

2. The plaintiff in O.S.No. 1/84 filed O.P.No. 1874/79 claiming himself to be the executor in terms of Ext. A2 Will dated 16.11.78 and seeking probate in his capacity as the executor. Sri. A.A. Joseph, Advocate filed O.P. No. 1327/1980 seeking probate in respect of Ext.A1 Will dated 16.11.1972 stated to be executed by the very same testator. Respondents, the natural heirs of the unmarried testator, contested the petition contending that there was suspicious circumstances surrounding both the Wills. Consequently the petitions were converted as suit; O.S.Nos. 1/84 and 2/84. Both the suits were later consolidated and tried as O.S.1/84, where the contentions of all the parties were dealt with. The learned Single Judge granted 'probate to the plaintiff in O.S.No. 1/84 with Exts. A1 and A2 attached to it, with the clauses relating to revocation and charities omitted from Ext.A2 and clauses relating to specific legacies and appointment of Executor omitted from Ext.A1'. This is under challenge in MFA No. 1054/94 at the instance of defendants 11.15 and 30 and in MFA.No. 1055/94 at the instance of respondents 20 and 23. Later respondents 20 and 23 did not contest the appeal and in their place defendants 12 and 14 got transposed as the appellants to contest MFA.No. 1055/94.

3. It is contended by the appellants that the propounders of the Will failed to prove the genuineness of the Will and therefore did not discharge their burden to obtain probate. The learned Single Judge rejected the said contentions relying on the evidence on record which consists of the oral testimony of PWs.1 to 3 and DW1 and documentary evidences Exts.A1 and A2, the Wills in question. PW1 is the attestor of Ext.A1 Will, PWs. 2 and 3 are the executor and one among the attestors of Ext.A2 will respectively and DW1 is the second attestor to Ext.A1.

4. It is contended by the appellants that the learned Single Judge failed to consider the interpolations contained in several parts of Ext.A2 Will dated 16.11.1978. It is further submitted that even going by the evidence of PW.3, the only attesting witness examined to prove execution of Ext.A2 Will, he did not speak of the other among the attestors to the said Will. The other Signatory was the scribe himself. Therefore, he cannot be termed as an attestor to the Will even. It is also submitted that there is difference in signatures of the testator contained in Exts. A1 and A2. It is further submitted that if the scribe has signed as an attestor his presence ought

to have been spoken to by PW3. He did not speak anything about his presence at the time of execution. There is also a contention that the bequeath contained in Ext.A2 regarding charity was not specific and that the testator had died within one year provided for in Section 118 of the Indian Succession Act and therefore that bequeath cannot take effect in law.

5. The last among these contentions cannot now hold good in the light of the decision of the Supreme Court reported in John Vallamattom and Anr. v. Union of India, 2003(3) KLT 66 = (2003) 6 SCC 611, whereby Section 118 of the Indian Succession Act has been declared unconstitutional. Therefore the bequeath to charity contained in Ext.A2 Will, in case the Will is found to be genuine Will hold good.

6. It is contended on behalf of the appellants in MFA No. 1055/94 that a reading of Ext.A2 Will discloses that the testator had acknowledged Ext.A1 Will. But the content of Ext.A1 discloses that if any modification thereof was required the testator had intended to get back Ext.A1 from the registry where it has been deposited and to make necessary modification thereof. So the cancellation of Ext.A1 by Ext. A2 is not proper. It is further contended, relying on the decision reported in David Tharakan v. Lilly Jacob, 1992 (2) KLT 426, that going by Section 70 of the Indian Succession Act no Will can be cancelled; it can alone be revoked. What is intended by Ext.A2 is the cancellation of Ext.A1 Will and such cancellation cannot hold good in the light of Section 70. So Ext.A1 still survives. It is further contended that the propounder of Ext.A2 will has not discharged his burden with regard to the suspicious circumstances pointed out by the appellants and other contesting respondents before the learned Single Judge.

7. In reply it is contended on behalf of the propounder who has been appointed as the executor of Ext.A2 Will that a mere suspicion alone is not sufficient to discard a Will. There shall be foundation for the suspicion. It is further contended that in both the appeals the substantial contention urged by the appellants is that by reason of Ext.A2 will Ext.A1 had been superseded. This is in fact an admission that there was due execution of Ext.A2 Will. Consequently the challenge in the appeal was confined only with regard to the bequeath to charity which cannot be sustained in

the light of the decision reported in John Vallamattom and Anr. v. Union of India, 2003 (3) KLT 66 = (2003) 6 SCC 611. It is further submitted that whether bequeath to charity is sustainable or not is not a matter germane to the proceedings in respect of the issuance of probate. Therefore, there is no ground for interference, propounder submitted.

8. Defendants 20 and 21, the legal heirs of first defendant, have now produced a codicil to Ext.A1 said to be executed by the testator to urge that by reason of such codicil Ext.A2 becomes more suspicious and to contend that in Ext. A2 there was no cancellation or revocation of such codicil. But it has to be borne in mind that even going by the contention of defendants 20 and 21 they obtained the codicil from the plaintiff in O.S.2/84 who died in the meanwhile. Thus if plaintiff in O.S.No. 2/1994 had knowledge about the codicil, necessarily that averment ought to have found place in the plaint itself or in O.P.No. 1327/80 wherein the plaintiff had sought for probate. More over he is also defendant No. 24 in the suit O.S.1/84 wherein he had not disclosed the existence of any codicil now produced by respondents 20 and 21. Therefore, in the light of these facts the codicil can easily be discarded and we do so. It does not in any way promote the case of the appellant against Ext.A2.

9. Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act provide that the Will shall be attested atleast by two witnesses and that while proving the Will atleast one among them shall have to be examined. In a probate proceedings it is the duty of the propounder to show that the 'Will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of disposition and had put his signature to the testament of his own free Will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other' (see Sreedevi and Ors. v. Jayaraja Shetty and Ors., AIR 2005 SC 780. Whether the first respondent had satisfied this burden or not is the point to be considered first.

10. It was contended that at page 5 of Ext.A2, there were interpolations. We examined the original and found that those are not real interpolations. The scribe had written certain stipulations regarding substitution of executor in case the

named executor dies or becomes unable to act as an executor in smaller fonts as compared to other fonts of his writing. These alleged interpolations written at page 5 in small fonts by the scribe do not in any way change the character of the Will or even affect any bequeath made in favour of any of the legatees including the executor. On the other hand it is confined only to appointing a substitute executor in case the original executor becomes disabled to function as such.

11. Another aspect pointed out as a suspicion surrounding the execution of the Will is the insertion of the name of PW3 as an attestor to the Will. It is submitted that he had written his name and subscribed his signature in between two lines where space has never been provided for the signature of a third attestor. In this regard the evidence of PW3 Dr. P.A. Varghese is to the effect that he had been summoned over telephone by the testator to go to his house and that when he went there there were three persons other than the testator in the house of the testator who included two scribes and a person from the registry. He was also categoric that the testator had dictated the terms of the Will and one among the scribes had written a draft and thereafter a fair was written and that the testator had signed all the pages of the Will and had also affixed his thumb impression and that he saw the testator signing it. He and another attestator had seen the testator signing and making his thumb impression in the Will and the testator had seen them affixing their signatures. He had also categorically deposed that the testator had slight shivering of his hand while making his signature as he was not physically well. Of course he had not stated anything about the first attestator. But that does not mean that it is sufficient enough to attribute a well founded suspicion with regard to the execution of the Will. Even though he had not mentioned anything about the first among the attestors, a reading of the Will discloses that he was none other than the scribe of the Will and PW3 had categorically deposed before the learned Single Judge during trial that the scribe had written it on dictation by the testator. Thus the presence of scribe is really spoken to by PW3. Therefore it cannot be stated that the scribe was not present when the testator signed the Will. It is true that PW3 had stated testator had signed Ext. A2 without corrections. As already mentioned above, the alleged interpolations in page 5 of Ext.A2 cannot be stated to be a correction but writing of stipulation with regard to another executor in small fonts. Writing of name and putting signature by PW3 in

the last page of Ext.A2 also cannot be said to be interpolations because PW3 had been summoned to the place of execution by the testator. It may not be in the know of the scribe. That may be the reason why the scribe did not write the name of PW3 in Ext.A2. According to PW3 the testator asked him to sign as a witness. Therefore he taking his own pen wrote his name and subscribed his signature as an attestor to Ext.A2. Therefore, it cannot be stated that PW3 signed it at a later time. He had been categoric in his deposition that he had signed at the time of execution itself. Therefore, he is one among the attestors competent to prove the Will in terms of Section 63 of the Indian Succession Act.

12. As regards the testamentary capacity of the testator. PW3 a doctor by profession had stated that he had his full mental capacity to know the consequence of what he had dictated or done. PW3 had long acquaintance with the testator. Of course he had committed a mistake during his examination with regard to his marital status that he was a married person having 5 children. That is not much relevant. PW3 has no interest with regard to the property bequeathed. He also did not have an interest in the executor as well. In such circumstances there is no reason to disbelieve PW3.

13. PW2 the executor of Ext.A2 Will has also very categorically deposed about his acquaintance with the testator. According to him though the testator had a minor stroke and consequent shivering of his hands while writing and was using a lens for reading, he did have sharp memory and could know the consequence of all his acts. Thus the testamentary capacity of the testator had also been proved by him also.

14. In such circumstance the burden cast on the propounder had been duly discharged in this case in terms of Section 68 of the Evidence Act and Section 63 of Indian Succession Act. Added to this is the fact revealed by the new codicil sought to be introduced by defence 20 and 21 enclosing there with the vakalaths said to be signed by the testator on 27.3.1979, much later to the execution of Ext.A2. That is an added proof of the mental capacity of the testator. More over the vakalaths contain the thump impression as well along with signature, as in the case of Ext.A2.

15. Interpolation is the only ground alleged as a suspicious circumstances in respect of Ext.A2. When there is no such interpolations as already discussed above there arises no other suspicious circumstances in respect of Ext.A2. Therefore, the finding of the learned Single Judge that the Will was duly executed, is perfectly sustainable. In such circumstance we need not discuss the precedents cited at the bar with respect to this aspect.

16. The contention that Ext.A2 Will is a cancellation of Ext.A1 and that no Will can be cancelled cannot also be accepted. The decision in David Tharakan v. Lilly Jacob, 1992 (2) KLT 426, relied on by the appellants was rendered in a special circumstances. In that case two letters of the testator had been produced to show that the Will had been cancelled. The copy of the Will had been examined by the Court and found that the signature had been crossed indicating cancellation of the Will. It was in such circumstances the Court found that it was a cancellation and that the Will cannot be cancelled but can only be revoked. In this case what is mentioned in Ext.A2 is that The word is an indication to mean revocation of the earlier Wills. It is not a mere cancellation as referred to in David Tharakan v. Lilly Jacob, 1992 (2) KLT 426. Going by the statutory restriction contained in Section 70 of the Indian Succession Act, execution of a later Will by the same testator amounts to revocation of the earlier one. Therefore Ext.A2 is in revocation of Ext.A1. Thus the contention raised based on the decision in David Tharakan v. Lilly Jacob, 1992 (2) KLT 426, does not have any sustenance.

17. The bequeath to charity shall have to be sustained in the light of Section 118 of the Indian Succession Act being declared as unconstitutional in the decision in John Vallamattom and Anr. v. Union of India, 2003(3) KLT 66 = (2003) 6 SCC 611. When there is a provision bequeathing certain property of the testator for charitable purpose, necessarily that is a matter for the executor to execute. Naturally as held by the Supreme Court in Ishwardeo Narain Singh v. Smt. Kamta Devi and Ors., AIR 1954 SC 280 and in Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors., (1993) 2 SCC 507, whether one bequeath is good or bad is not within the purview of the probate Court. In such circumstance we have to modify the impugned judgment granting probate in respect of Ext.A2 as it is.

Appeals are therefore dismissed, of course, making appropriate modification of the judgment as mentioned above.

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