

Augustions Vs. Joseph and ors.

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Court : Kerala

Decided On : Apr-06-2005

Reported in : AIR2005Ker204

Judge : K.A. Abdul Gafoor and; S. Siri Jagan, JJ.

Acts : [Indian Succession Act, 1925](#) - Sections 63 and 312; [Evidence Act, 1872](#) - Sections 68

Appeal No. : M.F.A. No. 836 of 1996 (A)

Appellant : Augustions

Respondent : Joseph and ors.

Advocate for Def. : T.V. George,; P.J. Joseph and; P.J. Varghese, Advs.

Advocate for Pet/Ap. : K.K. Chandran Pillai, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Abdul Gafoor, J.

1. Appellant -plaintiff in O.S. No. 4 of 1994 did not succeed in obtaining letters of administration in respect of Ext.AI Will dated 17-12-1981 executed by his father Chacko. Therefore, this appeal.

2. The said Chacko died on 3-1-1985. Later, in the year 1994, the appellant applied for letters of administration invoking Section 312 of the Indian Succession Act. His three brothers and two sisters were arrayed as respondents in the said petitions. In the mean time, another sister Brijitha expired on 4-12-1988. There were no other legal representatives to the testator than the plaintiff and the respondents.

3. Respondents 2 and 3 contested the Will contending that their father had not executed Ext. A1 Will/Thereupon, O.P. No. 12 of 1994 was converted as a suit. Evidence was let in by either side. Execution of the Will was attempted to be proved through PW2 the attester to the Will satisfying the requirement under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. The testamentary capacity was sought to be proved by the evidence of plaintiff himself as PW1 who was residing with the testator and PW2, the attester to the Will. Ext. A2 is the death certificate of the testator.

4. One among the contesting defendants, who gave evidence as DW1, disputed the Will. According to him, his father never executed Ext.A1 Will. Signature in Ext.A1 Will was not of his father.

5. Appreciating the evidence on record, the Court below came to the conclusion that the disproportionality in the bequeath made in Ext. A1 Will in the name of the plaintiff as compared to that in favour of the defendants and the delay in approaching the Court for letters of administration were sufficient to cast doubt on the execution of the Will. Apart from that, the Court below also found from the evidence of PW2 that he had not properly proved execution of the Will. The Court below was also of the view that considering the age and health of the testator at the relevant point of time, he did not have the necessary testamentary capacity to execute Ext. A1 Will. Accordingly, letters of administration was declined. This is under challenge in this appeal.

6. Any Court considering the admissibility of a Will has to first examine whether the plaintiff who seeks letter of administration has prima facie proved its execution and the testamentary capacity of the testator.

7. PW1 has spoken to before the Court below that the testator, his father, had been living with him since long and even at the time of execution of the Will and until his death. Other sons including defendant No. 2 had been living separately from the father. Defendant No. 2 was living separately. He is a bachelor. The testator had been hospitalised in his life only once, that too due to ailments of piles. At the time of his death, he had not been in hospital though he had undertaken treatment by a doctor. He did have full physical capacity as well as mental capacity to execute the Will. He had been the President of a Co-operative Society and he himself had gone to the Registrar's Office for execution of the Will without the assistance of any one else.

8. According to PW2, he was a scribe attached to the office of his brother, who was a document writer. He and his colleague Salim were the attestors to Ext.A1. According to PW2, the testator Chacko used to come to the office of his brother for execution of documents on behalf of the Co-operative Society of which he was the President, releasing mortgage in favour of the members of the Society after due discharge of the debts incurred by them. Therefore, he knew the testator since long as a usual visitor to the office where he was working. According to him, on the date of execution of Ext.A1, Chacko had been to his office in the morning and preparation of the Will had been completed by noon. Chacko had subscribed his signature to Ext.A1 Will in his presence and in the presence of his colleague Salim. According to him, he had also signed Ext. A1 in the presence of Chacko and Salim who had seen him signing. Salim has also seen the testator as well as PW2 signing the document Ext.A1. Salim also attested the document signing it in his presence and in the presence of the executant.

9. More over, Ext.A1 is a registered Will. That also prima facie indicates that the Registrar had identified the executant of the document with the assistance of two other persons. Thus, there is proof of due execution of the Will through PW2 and that is sufficient for the plaintiff to discharge his burden to prove the execution of the Will.

10. When the plaintiff had discharged his burden with respect to execution of Ext. A1, it is up to defendants 2 and 3 who did contest the Will, to adduce positive

evidence to show that the testator did not have any testamentary capacity to sign Ext.A1 Will and the signature in Ext. A1 was not that of the testator. According to 2nd defendant, who was examined as DW1, the testator had executed another settlement deed in respect of his property long before the execution of the Will and on the strength of that settlement deed, he himself had obtained properties of his father and mother. According to him, his father and mother, as per the said settlement deed, partitioned the properties except that covered by Ext.A1 Will among his brothers. In such circumstances, a document admittedly executed by the testator was available at least to compare the signature in that document and that contained in Ext.A1. But no steps had been taken by any of the defendants, who contested the Will, for the production of that document and to prove that the signature contained in Ext.A1 was not that of the testator Chacko. In the absence of such evidence, a registered document like Ext.A1 duly proved through PW2 has to be taken as executed by testator.

11. Regarding testamentary capacity, there was not much to doubt from the evidence on record. PWs 1 and 2 were categoric with reference to the health, both mental and physical, of the testator. The testator had, according to PW1, never been in hospital at the time of execution of the Will. On the other hand, DW1 had a case that during the relevant period, the testator had been in hospital continuously and that he had attended the testator in the hospital. If he had such a case, he could have adduced evidence with regard to such hospitalisation either by producing documents from the hospital, if at all it was available, or at least examining some hospital staff including the doctor or at least by examining the neighbours. He had not moved his little finger in that regard. Therefore, there is nothing in this case available on record, to doubt the testamentary capacity of the testator.

12. Of course, ExtA1 reveals a disproportionate bequeath in favour of the plaintiff to the extent of 153 cents, as against 10 cents each given to defendants 1, 2 and 3 and 11 cents given to Brigitha, the sister who died on 4-12-1988. This may, prima facie, appear to be a suspicious circumstance surrounding the Will. But, the fact that the testator had partitioned not only his properties but the properties in the name of his wife as well as an earlier occasion shows that the testator had given

all the properties to his legal heirs in the normal circumstances. Even, DW1 had admitted that he had obtained the due share at that time. Therefore, the property covered by Ext. 1 was reserved for the purpose of his existence and, if, substantial portion of that property has been bequeathed to the plaintiff, who has been with him during his life time, it cannot be stated to be so unnatural. Even DW1 or any other sons did not have a case that they had been living with the testator. In such circumstances, if the testator had given a lion's share in the remaining property set apart for him, after partitioning the remaining property to his sons, as admitted by DW1 himself, such bequeath cannot be stated to be too disproportionate to doubt the execution of the Will.

13. Of course, there was delay until 1994 for the plaintiff-appellant to seek letters of administration. According to him, an accusation did not arise for the parties to doubt the Will which had been read over to them by the testator himself during his life time and on its basis, defendant No. 1 had already taken his share and sold it out to the daughter of the plaintiff. There is not much contest from defendants 1, 4 and 5 who remained ex parte in the Court below. An occasion arose only when defendant No. 2 moved for partition in O.S. No. 263 of 1993 on the file of the Munsiff's Court, Thodupuzha. Letters of administration was applied for at that time. Such delay cannot be taken as a reason to doubt the execution of Ext. A1 Will.

14. In the aforesaid circumstance, we are of the view that the defendants could not adduce any evidence to doubt the execution of ExtA1 Will and they have not succeeded in that regard. This makes the plaintiff-appellant entitled for letters of administration as applied for.

15. Accordingly, the appeal is allowed and the impugned judgment is set aside and the letters of administration applied for is ordered to be granted in favour of the appellant who shall administer the properties in terms of Ext.A1. A copy of Ext.A1 Will shall be annexed with the judgment and decree.