Abdul Kadar Vs. Pathumma

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Court : Kerala

Decided On : Dec-05-1993

Reported in : I(1994)DMC502

Judge : M.M. Pareed Pillay, J.

Appeal No. : S.A. No. 22 of 1988

Appellant : Abdul Kadar

Respondent : Pathumma

Advocate for Def. : E.V. Nayanar and; P.P. Jnanasekharan, Advs.

Advocate for Pet/Ap. : K. Aravindaksha Menon, Adv.

Disposition : Appeal dismissed

Judgement :

M.M. Pareed Pillay, J.

1. Plaintiffs 2 and 3 in O.S. 166 of 1982 of the Munsiff's Court, Kuthuparamba are the appellants. First plaintiff died. Plaintiffs filed the suit for partition claiming 2/5 shares in the plaint schedule property. Trial Court decreed the suit holding that Ext. B-3 Will relied by the first defendant was not consented by the heirs after the death of the testator. First defendant filed A.S. 22 of 1986 before the Additional

Sub Court, Tellicherry. The learned Additional Sub Judge allowed the appeal holding that Ext. B-3 Will is valid and binding on the plaintiffs and defendants 2 to 10 and accordingly dismissed the suit.

2. The plaintiff schedule property admittedly belonged to Ayisumma. At the time of her death she was survived by her children Kunhayan, Kunhammad and Pathumma. She had a daughter Sainaba who had predeceased her. First plaintiff is the wife of Kunhayan and her children are plaintiffs 2 and 3. Kunhammad's widow is the second defendant and her children are defendants 3 to 7. Pathumma's only daughter is the first defendant. Defendants 8 to 10 are the children of Sainaba.

3. In the written statement first defendant contended inter alia that she had obtained the property as per Ext. B-3 registered Will and that plaintiffs have no right to claim partition of the property. Plaintiffs' case is that Ext. B 3 being a Mohammedan will can have validity only if the excluded heirs had consented to it after the testator's death. It is the case of the plaintiffs that there is no evidence that Kunhayan and Kunhammad had expressed their consent to Ext. B-3 Will after death of Ayisumma and so Ex. B-3 cannot have any validity. Counsel for the first defendant pointed out that the evidence in the case definitely discloses the fact that they had consented to Ext. B-3 Will after death of Ayisumma. It is contended by the Counsel that express consent as such is not necessary and as the evidence in the case shows that Kunhayan and Kunhammad had ratified Ext. B-3 by their course of conduct Ext. B-3 cannot be considered to be invalid.

4. A Mohammedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts and bequests in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator. Ext. B-3 bequest in favour of the first defendat who is the heir of Ayisumma is in excess of the legal third. That being the position, the Will can be validated by the consent of the other heirs.

5. The question that arises for consideration is whether the consent should be express or implied. The consent need not be express. I may be signified by the conduct of the heirs showing their tacit approval of the Will. The heirs whose rights

are affected by the Will can definitely consent to the same either expressly or impliedly. By passive acquiescence they can consent to the Will executed by the testator. In a case where heirs did not challenge the Will for a long time, the Court can certainly infer that they have really consented to it. In other words, where a Mohammedan by his Will bequeaths more than one third of his whole property, consent of his heirs after his death can be gathered from the long course of conduct. It cannot be said that in every case express consent by the heirs has to be obtained and only in such a case the Will is valid. It is useful to refer to Ma Khatoon v. Ma Mya, (AIR 1936 Rangoon 448) where the Rangoon High Court held:

'When a Mohammedan, by his Will, bequeath more than one third of his property, the consent of the heirs to such bequest, required by the Mohammedan law, need not be express; it may be signified by conduct showing a fixed and unequivocal intention. It must however be given after testator's death'.

There is no evidence in the case that at any point of time the brothers of Pathumma (Kunhayan and Kunhammad) had ever raised any demand for partition of the property after death of their mother Ayisumma. On the other hand, they enjoyed the income of item I property as per the recitals in Ext. B-3 Will. This would sufficiently indicate that they signified their consent to Ext. B-3 Will, as per the recitals in Ext. B-3 Kunhayan and Kunhammad had right to enjoy the income of the property during their life-time.

As there is overwhelming evidence in the case to hold that Kunhayan and Kunhammad had consented to the execution of Ext. B-3 Will after death of Ayisumma, the only conclusion possible is to uphold the validity of the Will. The learned Additional Sub Judge was justified in coming to such a conclusion.

6. There is evidence that a portion of the property was acquired for Pazhassi Project. As revealed from Exts. B-4 and B-5 it was the first defendant who obtained the award amount. Ayisumma died about 23 years prior of the suit. As the first defendant is in possession of the property to the exclusion of the plaintiffs, they cannot claim partition of the property even if Ex. B-3 Will is not there.

There is no merit in the Second Appeal. The second appeal is dismissed. No costs.