George Vs. Varkey

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Court : Kerala

Decided On : Jul-25-2003

Reported in : 2004(1)KLT21

Judge : J.B. Koshy and; K. Thankappan, JJ.

Acts : Indian Succession Act, 1925 - Sections 63

Appeal No. : M.F.A. No. 848 of 1997 and Cross Appeal

Appellant : George

Respondent : Varkey

Advocate for Def. : Bechu Kurian Thomas, Adv.

Advocate for Pet/Ap. : Mathai M. Paikaday, Sr. Adv.,; Blaze K.Jose,; G. Unnikri

Judgement :

J.B. Koshy, J.

1. This appeal is filed against the judgment refusing grant of Letters of Administration under the Indian Succession Act, 1925. The petitioners/plaintiffs are the appellants. Varkey Varkey, father of fifth plaintiff, defendants 1 to 4 and late Mariakutty, mother of defendants 5 to 1 died on 19.3.1990. He had executed and registered Ext. A2 Will on 20.6.1987 bequeathing certain properties to plaintiffs 1

to 3 who are the sons of fifth plaintiff after cancelling Ext. A10 Will. Plaintiffs applied before the Court below for granting Letters of Administration with a copy of the said Will annexed. In the alternative they pleaded for granting Letters of Administration on the basis of Ext. A10 Will also. Defendants 1 and 10 contested the application.

2. In this appeal the first defendant (first respondent herein) alone is contesting the matter. The other defendants, despite receiving notice, did not appear before this Court to oppose the appeal. According to the written statement filed by the contesting first respondent, Ext. A2 Will dated 20.6.1987 has not been duly executed and contended that deceased had earlier executed Ext. A10 Will, The Court below found that finger prints in Exts. A2 and A10 were that of the testator. But Ext. A2 is not a valid Will as due attestation was not proved. The Court below found that Ext. A10 though properly executed was revoked as it was scored off and the suit was dismissed. A cross appeal was filed by the first defendant questioning the findings in the impugned judgment in so far as it is against him.

3. Four issues were framed by the court below which are:

'1. Whether the Will bearing No. 42 of 75 is Genuine?

2. Whether the testator had executed both the Wills Nos. 42 of 75 and 57/87 while the testator was in a sound disposing state of mind of his own accord after fully understanding the nature of the dispositions made in the said Wills Nos. 42 of 75 and 57/87 and the said Wills were duly attested?

3. In case the execution of Will No. 57 of 1987 is proved would it amount to revocation of Will No. 42 of 75?

4. What is the proper order as to costs and reliefs?'

4. The main questions to be decided in the appeal are whether Ext. A2 Will is genuine and whether it is a properly executed Will with testamentary capacity and proper attestation. Ext. A2 is perfectly regular on its face as it appears that testator has signed the Will in the presence of two witnesses who also signed in the presence of each other. It is also to be considered whether presumption omnia rite

esse acta as observed by the Court of Appeal in Wright v. Saderson (1984 IX PD 149) and as held by the Privy Council in Lloyd v. Roberts (12 Moo.P.C. 158) applies. As regards the facts of the case are concerned, the testator Varkey Varkey married thrice. Ext. A2 Will was executed on 20.6.1987 and he died on 19.3.1990 at the age of 92, after about three years of the alleged execution of Ext. A2 Will. During his life time all his children (daughters and sons) were married. It has also come out in evidence that apart from the properties in the Will he has gifted large part of his immovable properties to all his sons including the fifth plaintiff and defendants 1 and 2. It has also come out in evidence that defendants 1, 3 and 4 and predecessor of defendants 5 to 11 were children of the first wife of the testator. His second wife died immediately after the marriage. Thereafter, he again married. The second defendant as well as the fifth plaintiff (PW3) are the sons of the testator through his last wife (referred to as second wife also occasionally). PW3 with his family were living with the testator till his death and in old days he and his family were looking after him. Fifth plaintiff's mother died in 1972. The contesting defendant was residing separately from 1954 in another place gifted by the testator. The second defendant, another son, was also living separately. The contesting defendant as well as the second defendant were given more than 14 acres of land by the testator when he was alive. Ext. A4 is a registered gift deed gifting some landed property to the son of the contesting defendant by the testator in 1972. Ext. A5 is the registered gift deed gifting about 13 acres of landed property to the first defendant by the testator. The depositions of PW3, PW5 and DW1 the contesting defendant would show that all his sons were given properties. The testator already married away his daughters during his life time. It was the custom of Syrian Christians in Travancore-Cochin area to give landed property to sons and give amount considering the share of the property to daughters at the time of marriage as can be gathered from the provisions of the Travancore-Cochin Christian Succession Act and as spoken to by PW3, the custom was to give residential house to the younger son. What is bequeathed in Ext. A2 will is the residential property and the surrounding area to the family of PW3, who was the younger son. What was given under Ext. A2 is only 4 Acres and 67 cents. The testator had 55 Acres of land and except this property other properties were gifted to his children when he was alive. DW1 also deposed that

he is living separately from 1951 onwards and after 1971, after the death of the mother of PW3, he visited his father only two or three times in an year. According to him, they were not having very cordial relationship, probably due to instigation of PW3 and his mother. He deposed as follows:

The above background show that there is nothing irregular or suspicious circumstances in testator bequeathing the balance property remaining with him to the family of PW3 who was looking after him from 1954 till his death in 1990.

5. Ext. A2 Will is a registered deed. As already stated due execution of the same is apparent on the face of the Will. However, when objection is raised regarding genuineness of the Will and its attestation, the matter has to be considered by the Court. The Court found that signature in Ext. A2 as well as in Ext. A10 were that of the testator. He relied on the expert evidence of DW2. Paragraph 8 of the judgment deals with the same, which reads as follows:

'Since the first defendant denies the execution and challenges validity of the Wills, the first thing to be considered is whether Ext. A2, in fact, contains the signature of the testator. In view of the challenge the plaintiff took steps to forward the original Will to the Finger Print Expert for comparison of the finger prints with those in prior registered documents, the execution of which is not denied by the first defendant. The examination was done by DW2 who was the Finger Print Expert, Higher Grade, working in the Finger Print Bureau, Trivandrum. In Ext.C1 report he has opined after comparing the finger prints available at the reverse of the 1st page of Ext. A2 vis-a-vis those contained in Exts. A3, A11,A12, A13 and B9 that the finger print contained in Ext. A2 is of the person who has affixed his finger print in the other admitted documents. In Ext.C1 report has also given 10 aspects of identity which were found during comparison as above. Ext.C2 series are the photo enlargement of the finger prints concerned. Ext.C2 to C2(f) relates to such impressions contained in Exts. B9, A13, A11, A12, A3, A10 and A2 respectively. I have carefully examined these photo enlargements with reference to the opinion of the expert and I find that the aspects of identity enumerated in this report are quite correct. Notwithstanding the detailed examination of DW2 made by the learned defence counsel I am not satisfied that any valid reason exists to suspect the

correctness of the opinion of DW2 who is a well qualified expert'.

We are of the opinion that the above view of the court below is correct and no interference is required. We also note that the contesting defendant pleaded about Ext. A10 Will in the objection to deny granting of Letters of Administration. But while deposing in Court as DW1, he denied the signature in Ext. A10. But with regard to the signature in Ext. A2 Will he deposed before Court as follows:

Ext.C1 Commission report reads as follows:

'.....The finger impressions marked as 'Q2', 'Q13', 'Q9', 'A5', 'A2', 'A13' & 'A12' by me, described above are identical since they possess identical ridge characteristics in their nature and relative positions. I have marked ten of such identical ridge characteristics in the photographic enlargement of these finger impressions and they are described below.

Finger Impressions 'Q2', 'Q13', 'Q9', 'A5', 'A2', 'A13' & 'A12'

Point No. 1 is a ridge ending towards left.

Point No. 2 is bifurcation towards right, above point No. 1 with two ridges intervening.

Point No. 3 is a bifurcation towards right, above point No. 2 with one ridge intervening.

Point No. 4 is a bifurcation towards right, below and to the right of point No. 3 with three ridges intervening.

Point No. 5 is a ridge ending towards left to the right of point No. 4 with no ridge intervening.

Point No. 6 is a downward ridge ending to the right point No. 5 with five ridges intervening.

Point No. 7 is a bifurcation towards right, to the right of point No. 6 with three ridges intervening.

Point No. 8 is a ridge ending towards left, to the left of point No. 7 with no ridge intervening.

Point No. 9 is a ridge ending towards left, below point No. 8 with four ridges intervening.

Point No. 10 is a ridge ending towards left, to the left of point No. 9 with no ridge intervening.

Since Identical ridge characteristics as described above are present in their nature and relative positions the finger impressions 'Q2', 'Q13', 'Q9', 'A5', 'A2', 'A13' & 'A12' are identical, ie., they are made by the same finger of the same person.'

The Court below after considering the totality of evidence as well as the expert evidence correctly found that Signature in Ext. A2 is that of the testator.

6. Now we will consider the question whether the testator had the testamentary capacity at the time of execution of the Will on 20.6.1987. He died only on 19.3.1990, after two years and nine months of execution of Ext. A2 Will. The contesting defendant has admitted in deposition that his father had no serious ailments. He deposed that after the death of the mother of PW3, the father was generally silent, but he had no mental illness. He deposed in chief examination as follows:

He further deposed that:

The testator was not bedridden. He was mentally capable at the time of execution of the Will. Evidence of the first defendant will further show that the testator had attended the betrothal and marriage of his son two years prior to his death, that is after execution of Ext. A2 Will. The testator had executed Ext. A3 registered gift deed on the same day. Correctness of Ext. A3 is not disputed. The totality of the evidence will show that the testator had testamentary capacity to execute the Will.

7. To be a valid Will, apart from genuineness of the signature and testamentary capacity, it should also be proved that Section 63(c) of the Indian Succession Act, 1925 is complied with. Section 63(c) reads as follows:

'63. Execution of unprivileged Wills.(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary'.

Therefore, attestation by two witnesses is compulsory. On the face of the Will it can be seen that two witnesses have attested the Will as required under law. The first witness was PW1 and the second witness was the document writer himself who was no more at the time of filing suit. According to the learned District Judge, unless one of the attesting witnesses is examined and proved the Will, the Will cannot be accepted. Learned Judge observed as follows:

'.....It is not sufficient if persons other than the attesting witnesses are examined to show that the Will was in fact signed by the testator in the presence of persons other than the attesting witnesses'.

The above view is not fully correct. In this connection we refer to Section 68 of the Indian Evidence Act regarding proof of execution of Will. Section 68 reads as follows:

'68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

PROVIDED that it shall not be necessary to call an attesting witness in proof of the executionof any document, not being a Will, which has been registered in accordance with the provisionsof the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whomit purports to have been executed is

specifically denied'.

The above section shows that what is necessary is to call for the purpose of proving the execution one of the attesting witnesses, if he is alive. So the obligation is only to call at least one of the attesting witness, if he is alive, to the Court for proving the Will. But even if he denies the Will, if by other evidence it is proved that there is proper attestation, the Will can be accepted. Court is free to believe or disbelieve him after analyzing the entire evidence and deposition of attesting witness is also to be scrutinised by the Court like deposition of any other witness. In this connection we refer to Section 71 of the Indian Evidence Act, 1872, which reads as follows:

'71. Proof when attesting witness denies the execution.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence'.

Here PW1 who was the only attesting witness alive was called (summoned as witness). Therefore, obligation under Section 68 of the Evidence Act was complied with. Of course, he denied the execution of the Will. Then the question is whether proper attestation was proved by other evidence, despite denial by PW1.

8. PW1 was 79 at the time of examination. He admitted that he is Ulahannan, son of Pathrose, whose name is appearing as witness in Ext. A2 Will dated 20.6.1987. According to him, he went to register a Will of 17.6.1987. At that time, the fifth plaintiff Pathrose asked him to attest a Will. He said that he is signing his own Will and he is busy. Then PW3 stated that he may come after three days. (Ext. A2 was executed after three days). But, according to PW1, he did not attest Ext. A2 Will. He opposed that he came to know from PW3 that he was mentioned as a witness in Ext. A2. He signed an affidavit stated that he did not sign the Will when PW1 and his advocate came to his house and requested. In the affidavit he stated that he came to know about execution of the Will from DW1 but during deposition before the Court he deposed that he came to know about the Will from PW3. It has come out in evidence that PW1 was closely known to the testator as well as the first defendant and PW3. PW4 is the document writer. He was the assistant of

Varghese Joseph, the registered document writer and who was the second attesting witness in the Will. He was working in his office at the time of signing Ext. A10 as well as Ext. A2 Wills. He stated that he knew the handwriting of the document writer and his signature and that Varghese Joseph had wrote and signed the Will as a witness. PW4 was sitting next to Varghese Joseph. He further stated that both PW1 as well as late Varghese Joseph signed as attesting witnesses in the Will in his presence. He was present when Ext. A2 Will was signed at the document writer's office and he saw the testator as well as the attesting witnesses signing the Will in the presence of each other. He is still working in that office even after the death of Varghese Joseph the second attesting witness. Therefore, he proved the proper attestation. PW4 also stated that he knew the testator and PW1 earlier and PW1 had earlier also approached the said Varghese Joseph for writing his documents. That fact was admitted by PW1 in his deposition. Eventhough he was cross examined, PW4's evidence was not shaken.

9. PW5 is another son of the testator. He is not a beneficiary under Ext. A10 or A2 Will. He also deposed that he was present when the testator and the attesting witness signed the Will and he saw them signing the Will in the presence of each other. He was present at the time of registration of the document also. Another important official witness is PW2. PW2 is the Sub Registrar who registered the Will. He deposed that the testator himself presented the Will. On that day he also registered Ext. A3 gift deed written by the testator. He stated that before registering the Will he verified the identity and whether he is signing the document knowing its content at his free will and only after finding that he himself is executing the Will with full testamentary capacity, the Will was registered. The evidence of PW2 would show that the testator himself had presented the Will. It cannot be forgotten that the Will was drafted by an expert document writer and that the testator had full intention to bequeath the properties as mentioned in Ext. A2 Will. Evidence of PW3, PW4 and PW5 are to the effect that both the attesting witnesses signed in the presence of each other. PW2's evidence corroborates the above evidence regarding genuineness of the Will. It is true that registration is not compulsory for a Will. Registration of Will is optional. If a Will has been registered, that is a circumstance, which may having regard to the circumstances to prove its

genuineness. But, as held by a Division Bench of this Court in Natarajan v. Section N.D.S. Trust (1995 (2) KLT 862) the mere fact that a Will is a registered Will by itself is not sufficient to dispel the necessity to prove the Will otherwise. In this case, apart from the registration of the Will the evidence of PW3 to PW5 established that the Will was properly attested, despite denial by PW1. Here, the formalities of due execution of the Will were apparent on the face of the record. Even if the attesting witness examined denies proper attestation, it is for the Court to decide whether the Will was duly attested considering the entire evidence. Appraisal of evidence is the duty of the Court. In paragraph 5 of the Division Bench decision in Ittoop Varghese v. Poulose and Ors. (1974 KLT 873) it is stated as follows:

'5. But, as we have pointed out earlier, 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. The law on this point is stated thus by a Division Bench of the Calcutta High Court in Brahmadat Tewari v. Chaudan Bibi (AIR 1916 Cal. 374). At page 375 the principle is stated thus:- 'The principle is well settled that when the evidence of the attesting witness 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 wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will'.

Again, at page 376 it is observed thus:-

'it is not necessary, however, that affirmative evidence should be forthcoming that the testator did, as a matter of a 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 11 Jur. (N.S.) 284) the true test is whether the testator might have seen, not whether he did see the witnesses sign their names (Newton v. Clarke (1839) 2 Curt. 320). In cases of this description, as was pointed out by this Court in Sibo Sundari Debt v. Hemangini Debt (1900 (4) CWN 204) on the authority of Wright v. Sanderson, Sanderson, In re (1884 (9) P.D. 149=53 L.J.P. 49); every presumption will be made in favour of due execution and attestation in the case of a will regular on the face it and apparently duly executed'.

Again, in Manindra Nath Ganguli v. Durga Charan Ganguli (ILR (1949) 1 Cal 471) at page 475 it is observed thus:-

'The question, therefore, arises whether the probate Court is entitled to hold in favour of the Will where the attesting witness 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) P.D. 149, 163)'.

In the light of these weighty pronouncements with which we respectfully agree we are entitled to look into the whole circumstances of this case and pronounce on the validity of the Will. The various circumstances have already been stated. We are satisfied that the circumstances of this case are sufficient to come to the conclusion that there is proof of the due compliance of the formalities required by Section 63 of the Indian Succession Act in this case'.

10. After considering various English and Indian decisions, in K.M. Varghese and Ors. v. K.M. Oommen and Ors. (AIR 1994 Ker. 85) a Division Bench of this Court held as follows:

'In considering the evidence of the attesting witness for the purpose of proving the Will, we feel that we have to take into account all the circumstances and we must not be persuaded by the vague statements of the witnesses to hold that the Will has not been proved properly. We are of the opinion where the evidence of the attesting witnesses is vague, indefinite, doubtful or even conflicting upon material

points, the court is entitled to consider all the circumstances of the case and judge collectively herefrom whether the requirements of the statute have been complied with, it is possible for the court on an examination of the entire circumstances and evidence to come to a conclusion that the recollection of the witnesses is at fault or that their evidence is suspicious or that they are wilfully misleading the court and, therefore, the court is obliged to pronounce in favour of the will, disregarding the testimony of the witnesses'.

In Mathew v. Devassykutty (AIR 1988 Ker. 315) a Division Bench of this Court also held that even if attesting witnesses deny proper attestation, from the evidence Court can find out whether there is proper attestation. The Apex Court in Naresh Charan v. Paresh Charan (AIR 1955 SC 363) observed as follows:

'.....It cannot be laid down as a matter of 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.....'.

In H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors., AIR 1959 SC 443, the Apex Court held that there is solemnity in the matter of proof of Will but onus is on the propounder of the Will to prove the Will. At paragraph 19 of the above decision the Apex Court held as follows:

'19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before the Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put

his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. ..... It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas.....'.

A Constitution Bench of the Supreme Court in paragraph 4 of the judgment in Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee (AIR 1964 SC 529) has given guidelines how the Will is proved. In paragraph 4 of the judgment the Apex Court stated as follows:

'4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp(1) SCR 426=AIR 1959 SC 443 and Rani Pumima Devi v. Khagendra Narayan Dev, (1962)3SCR 195 = AIR 1962 SC 567. The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus...'.

We are of the opinion that onus was discharged by the propounder of the Will. PW1, the only attesting witness, was called. Of course, he was declared hostile and he denied the Will. But, a reading of the evidence as a whole, especially evidence of PW3, PW4 and PW5 corroborated by PW2 would show that the Will was executed in accordance with law in the presence of two attesting witnesses, that the attesting witnesses including PW1 have signed the Will in the presence of each other and they saw the testator signing the Will. In fact there is no suspicious circumstance also here. The testator who had 55 Acres of land as deposed by DW1, has given the properties to all his sons and married away his daughters. The

first defendant who alone is now contesting was also given about 14 Acres of land and he is residing away from the testator from 1954 onwards. His relationship was not cordial. The testator as per the custom bequeathed his properties to the family of PW3, the youngest son, with whom he was residing throughout his life and who was looking after him in his old age even after the death of the mother of PW3 in 1971 till his death. Property is in his possession also. Ext. A10 Will written by the testator was cancelled by scoring and has expressly stated in Ext. A2 Will. Therefore, Ext. A2 is the last valid Will of the testator.

In the above circumstances, we set aside the judgment of the court below and allow the appeal. We grant the Letters of Administration with a copy of Ext. A2 will attached. The appellant and respondents are members of the same family. In the circumstances of the case, we direct that parties should bear their costs throughout. The Cross Appeal is dismissed.