

Janu and Others Vs. Thanka and Others

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Court : Kerala

Decided On : Jul-16-2012

Reported in : 2012(3)KLT575; 2012(3)ILR(Ker)822; 2012(3)KLJ736

Judge : V. Chitambaresh

Appeal No. : R.S.A.No.895 of 2012

Appellant : Janu and Others

Respondent : Thanka and Others

Judgement :

Does the mere fact that the beneficiaries had also appended their signature amongst the several attesting witnesses to the Will invalidate the disposition made thereunder Decisions on this point are far and few and none by this Court hitherto.

2. The plaint schedule property comprising of three items originally belonged to one Vannery Raman who died on 9.12.1970. The three children of Vannery Raman by name Kochunni, Unni @ Raman and Kurumba had earlier filed a suit for partition in O.S.No.47/1980. The suit was decreed and affirmed in appeal in A.S.No.175/1983 whereby a preliminary decree for partition was passed. A final decree for partition followed and the sharers also took delivery of the various items of property pursuant thereto.

3. One of the sons of Vannery Raman by name Vasu was the first defendant in O.S.No.47/1980 whose children have filed the suit in O.S.No.1958/2001. The present suit has also been filed for partition of the very same property after setting aside the decree for partition in O.S.No.47/1980. The plaintiffs contend that Vannery Raman had executed Ext.A1 unregistered Will dated 30.7.1959 as regards devolution of his assets. Item No.1 property is bequeathed to Kochunni, Unni @ Raman and Vasu in equal shares and Item No.3 property to Kochunni and Unni @ Raman in equal shares. The plaintiffs however concede that item No.2 property had been assigned away by Vannery Raman during his life time itself.

4. It is the case of the plaintiff that the suit in O.S.No.1958/2001 is necessitated since Ext.A1 Will could not be produced by Vasu in O.S.No.47/1980. The entitlement of the property to the various sharers would drastically change if the bequest under the Will is given effect to. Therefore the present suit has been filed for partition after setting aside the decree in O.S.No.47/1980 in relation to the same property.

5. The contesting defendants point out that the suit in O.S.No.1958/2001 is barred by the principles of constructive res judicata in view of the decree in O.S.No.47/1980. The predecessor-in-interest of the plaintiffs-Vasu- could have as well produced Ext.A1 Will in O.S.No.47/1980. Ext.A1 Will is vitiated since three out of the five attesting witnesses are beneficiaries of the bequest. The suspicious circumstances surrounding the due execution of Ext.A1 Will have at any rate not been dispelled by the plaintiffs.

6. The courts below dismissed the suit for partition in O.S.No.1958/2001 and the plaintiffs have come up in Regular Second Appeal. The following substantial questions of law as reframed arise for consideration in this Regular Second Appeal:-

(i) Whether the mere fact that the beneficiaries had also appended their signatures amongst the attesting witnesses vitiate the Will ?

(ii) Whether the suit in O.S.No.1958/2001 is barred by res judicata in view of the decree in O.S.No.47/1980 which has become final ?

I heard Mr.N.Subramaniam, Advocate on behalf of the appellants and Mr.D.Anil Kumar, Advocate on behalf of respondents 21 to 27 in the Regular Second Appeal. The methodical preparation of the case by Mr.N.Subramaniam is worthy of emulation by any junior counsel.

7. Two reasons have been held out against the plaintiffs to find that suspicious circumstances surrounding the due execution of Ext.A1 Will have not been dispelled. They are:-

(i) Three out of the five attesting witnesses are beneficiaries under Ext.A1 Will.

(ii) The signature of Raman in Ext.A1 Will has not been proved in accordance with law.

Does the mere fact that the beneficiaries had also appended their signature amongst other attesting witnesses vitiate the Will and the disposition made thereunder ?

Certainly not especially when there is nothing in evidence to show that the beneficiaries had influenced the testator. Ext.A1 Will on the other hand reveals that the Will was being executed after obtaining the consent of the beneficiaries as well. This explains the reason as to why the signature of the beneficiaries also find a place amongst the attesting witnesses.

8. This precise question has been considered decades ago in *Shiam Sundar Singh v. Jagannath Singh* (AIR 1927 Privy council 248) as follows:-

"Its manifest object was to secure the co-operation of his sons in carrying out the dispositions of the Will and to do that by inserting in the Will a formal declaration that his sons, by appending their signatures thereto, had concurred in those dispositions. By reading the clause as declaring that the sons had signed the Will as attesting witnesses, one would ascribe to it a meaning according to which it would not only defeat the object of the clause itself, but nullify the distribution of his property which the testator was seeking to bring about in making his Will. The more reasonable and natural reading would appear to be that the sons had attached their signatures as concurring in the declaration contained in the

paragraph; and this latter construction (under which this particular declaration would take effect, together with the Will as a whole) seems to be enjoyed upon the Courts by S.71, of the Succession Act."

(emphasis supplied)

To the same effect is the decision of the Supreme Court in Rur Singh and others v. Bachan Kaur [(2009) 11 SCC 1] wherein it is held as follows:-

"Only because one of the beneficiaries attested the Will, the same could not mean that he had taken an active part in it. In any event, the learned trial Judge as also the first appellate court found sufficient explanation therefor holding that as the Will was executed in the testator's house and he had been living jointly with his sons, their presence in the house was natural."

(emphasis supplied)

There is no finding by the courts below that the beneficiaries had taken an active part in the execution of Ext.A1 Will other than appending their signature to it. Moreover the beneficiaries are not the sole attesting witnesses to Ext.A1 Will to infer that they had played a dominant role in its execution by the testator.

9. None of the witnesses were alive to enable Ext.A1 Will being proved in terms of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. The plaintiffs have examined the son of one of the attesting witnesses by name Madhava Marar to identify the signature found in Ext.A1 Will. He had also produced Ext.X1 document prepared by his father who was a scribe by profession which contained his signature as well. The plaintiffs in addition produced Ext.A12 copy of deed jointly executed by Vannery Raman and others. A comparison of the signature of Raman in Ext.A12 deed with that found in Ext.A1 Will leaves no room for doubt. It can safely be concluded that Ext.A1 Will has been sufficiently proved in terms of Section 69 of the Indian Evidence Act. I therefore answer substantial question of law No. (i) in favour of the plaintiffs and hold that Ext.A1 Will is valid and genuine.

10. The relevant part of Section 11 of the Code of Civil Procedure, 1908 ('the CPC' for short) is as follows:-

11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I -

Explanation II -

Explanation III -

Explanation IV - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V -

Explanation VI -

Explanation VII -

Explanation VIII-

11. The existence of Ext.A1 Will might and ought to have been made a ground of defence in the earlier suit for partition to which Vasu was very much a party. There was no whisper about Ext.A1 Will either in Ext.P14 reply notice or in the written statement filed by Vasu in O.S.No.47/1980. The intrinsic evidence shows that Vasu had retired from service as a Government employee and was diligently defending the suit in O.S.No.47/1980. Vasu had engaged different counsel in the suit as well as in the appeal and there is nothing to show that he was mentally unsound at that time. Equally unacceptable is the plea of the plaintiffs that Ext.A1 Will could not be traced out by Vasu for production in O.S.No.47/1980. The

plaintiffs who claim only through Vasu cannot get over the bar of Explanation IV to Section 11 of the CPC under the circumstances.

12. The Supreme Court in *Konda Lakshmana Bapuji v. Government of A.P. and others* (2002 (3) SCC 258) has held as follows:-

In substance, Section 11 bars a Court from trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court and has been heard and finally decided by such Court which is competent to try such subsequent suit or the suit in which such issue has been subsequently raised. Eight Explanations are appended to it. We are concerned with Explanation IV which embodies the principle of constructive res judicata and says that any matter which 'might and ought' to have been made a ground of defence or attack in such former suit shall be deemed to have been directly and substantially in issue in such suit. A conjoint reading of Section 11 and Explanation IV shows that a plea which might and ought to have been taken in the earlier suit, shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit.

(emphasis supplied)

To the same effect are the following decisions:

(i) *P.K.Vijayan v. Kamalakshi Amma* [(1994) 4 SCC 53]

(ii) *Madhavkrishna v. Chandra Bhaga* [(1997) 2 SCC 203] and

(iii) *Ramadhar Shrivastava v. Bhagwandas* [(2005) 13 SCC 1]

The dispute as regards partibility of the property based on Ext.A1 Will should be deemed to have been decided against the plaintiffs in view of the decree in O.S.No.47/1980. I answer substantial question No. (ii) against the plaintiffs and hold that O.S.No.1958/2001 is barred by constructive res judicata.

13. The Regular Second Appeal deserves to be dismissed since substantial question of law No.(ii) has been answered against the plaintiffs. The suit for partition in O.S.No.1958/2001 is dismissed confirming the judgment and decree of

the courts below.

The Regular Second Appeal is dismissed. No costs.

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