

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 17TH DAY OF JUNE 2015/27TH JYAISHTA, 1937

RFA.No. 520 of 2010 ()

OS 530/1992 of ADDL.SUB COURT, PALAKKAD

APPELLANTS(PLAINTIFFS 1 TO 4):

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1. KAMALAM, DAUGHTER OF CHAMI,
RESIDING AT MAYILARKODE, KODUVAYUR AMSOM
CHITTUR TALUK, KODUVAYUR- 678 501.
 2. SAROJINI, DAUGHTER OF CHAMI,
RESIDING AT THIRUPPUR TOWN, COIMBATORE DISTRICT
TAMIL NADU.
 3. SATHYABHAMA, DAUGHTER OF CHAMI,
RESIDING AT PIRAYIRI AAMSOM, PALAKKAD TALUK
PIRAYIRI-670 741.
 4. NIRMALA, DAUGHTER OF CHAMI,
RESIDING AT SALEM TOWN, SALEM DISTRICT, TAMIL NADU.

BY ADVS.SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SMT.O.K.SANTHA
SMT.P.L.MARY TREASA

RESPONDENT(S)/(DEFENDANTS):

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1. GANGADHARAN, SON OF CHAMI,
RESIDING AT MAYILARKODE, KODUVAYUR AMSOM
CHITTUR TALUK, KODUVAYUR- 678 501.
 2. KESAVAN, SON OF CHAMI,
RESIDING AT MAYILARKODE, KODUVAYUR AMSOM
CHITTUR TALUK, KODUVAYUR- 678 501.

R1 BY ADV. SRI.U.BALAGANGADHARAN
R2 BY ADV. SRI.GEEN T.MATHEW
R2 BY ADV. SRI.ANTONY MATHEW

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 09-06-2015, THE
COURT ON 17.6.2015 DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

R.F.A. No.520 of 2010

Dated 17th June, 2015.

J U D G M E N T

The surviving plaintiffs in a suit for partition are the appellants.

2. Plaintiffs 1 to 4 are the daughters and the fifth plaintiff is the wife of one Chami. The defendants are the sons of Chami. The case of the plaintiffs is that an item of property held jointly by Chami and the defendants was partitioned among them on 21.8.1984 and as per terms of the said partition, the plaint schedule property was retained jointly by Chami and the first defendant. According to the plaintiffs, Chami died on 18.12.1986 and on his death, his one half right over the plaint schedule property devolved on the plaintiffs and the defendants jointly and the plaintiffs are entitled to 5/12 share in the said property.

3. Originally, the second defendant who was also entitled to a share in the plaint schedule property was not made a party to the suit. The first defendant contested the suit

contending, among others, that Chami had executed a will in his favour on 28.8.1982 and as per the terms of the said will, the plaint schedule property devolved on him on the death of Chami.

4. The evidence in the case consists of the testimonies of Pws.1 and 2 and Exts.A1 to A3 on the side of the plaintiffs and the testimonies of Dws.1 and 2 and Exts.B1 to B7 and X1 on the side of the first defendant. Among the documents, Ext.A1 is the partition deed executed between Chami and his sons on 21.8.1984 and Ext.B1 is a certified copy of the will claimed to have been executed by Chami on 28.8.1982. Ext.B4 is a duplicate copy of Ext.B1 will. Ext.X1 is the copy of the filing register maintained in the concerned Sub Registry in respect of Ext.B1 will. Among the witnesses examined, PW1 is the fifth plaintiff, PW2 is the first plaintiff, DW1 is the first defendant and DW2 is a witness examined by the first defendant to prove the execution of Ext.B1 will.

5. The trial court rejected the case set up by the first defendant and decreed the suit. The first defendant challenged

the decision of the trial court in A.S.No.629 of 1996 before this Court. This Court, on a consideration of the materials on record, found that the decision taken by the trial court in the absence of all the sharers in the array of parties is unsustainable and consequently, remitted the suit for fresh disposal with liberty to the plaintiffs to implead all the sharers.

6. Pursuant to the decision of this Court in the appeal referred to above, the second defendant was impleaded in the suit. On his impleadment, he filed a written statement supporting the case of the plaintiffs. While the suit was pending so, the fifth plaintiff died.

7. When the case came up for trial after the remand, the first plaintiff gave further evidence on behalf of the plaintiffs. The first defendant also gave further evidence after the remand. In addition, the first defendant had summoned and examined DW2 again. Thereupon, on a consideration of the materials on record, the trial court came to the conclusion that the rights of Chami over the plaint schedule property were devolved on the first defendant on his death by virtue of the

provisions contained in Ext.B1 will. Consequent on the said finding, the suit was dismissed. The surviving plaintiffs are aggrieved by the said decision of the trial court. Hence this appeal.

8. Heard the learned counsel for the appellants and the learned counsel for the first respondent, the first defendant.

9. The learned counsel for the appellants contended that the secondary evidence of the contents of the will could be adduced by the first defendant only on establishing the existence of any one of the conditions stipulated in Section 65 of the Evidence Act. According to the learned counsel, in the absence of any evidence to show that the instant case is a case where the first defendant is entitled to adduce secondary evidence, the court below should not have accepted the secondary evidence of the contents of the will. The learned counsel also contended that even if it is admitted that the first defendant was entitled to adduce secondary evidence of the contents of the will, the execution of the same by Chami has not been proved as provided for under Section 68 of the

Evidence Act. The learned counsel further contended that even if it is admitted that the execution of Ext.B1 will has been proved, it has to be held that in so far as the plaint schedule property was the joint family property of Chami and his sons, Chami was incompetent to execute a will in respect of the same. The learned counsel further contended that since the original of the will has not been produced before the court and since it is admitted that the testator has executed Ext.A1 partition deed in respect of the property covered by the will, at any rate, it has to be presumed that the will has been revoked by the testator by destruction. The learned counsel, relying on the decision of the Apex Court in **Bharpur Singh v. Shamsher Singh** [(2009) 3 SCC 687] further contended that the first defendant being the propounder of the will, he is duty bound to remove all the suspicious circumstances surrounding the execution of the will. According to the learned counsel, the unnatural disposition of property excluding the female children of the testator from inheriting the assets of the testator and the conduct of the first defendant in accompanying Chami to the

Sub Registry for execution of the will are suspicious circumstances surrounding the execution of the will which the first defendant should have removed by giving sufficient and cogent evidence.

10. Per contra, the learned counsel for the first respondent contended that the plaint schedule property exclusively belonged to Chami and as such, he was competent to execute a will in the nature of Ext.B1 in respect of the same. The learned counsel also contended that the specific case of the first defendant is that the fifth plaintiff, the wife of Chami was given a life interest in respect of the plaint schedule property as per the terms of the will and therefore, the original of the will was entrusted by Chami to her. According to the learned counsel, since the custodian of the will is one of the plaintiffs in the suit and since the will was sought to be proved against her, the first defendant is entitled to adduce secondary evidence of the contents of the will. The learned counsel also contended, relying on the evidence tendered by DW2, that the execution of Ext.B1 will has been proved beyond doubt. The

learned counsel further contended that mere execution of a document in respect of a portion of the property covered by the will by the testator alone is not sufficient to infer revocation of the will. The learned counsel further contended that mere exclusion of the female children from inheriting the property held by the testator cannot be regarded as a suspicious circumstance surrounding the execution of the will.

11. Section 65 of the Evidence Act deals with the cases in which secondary evidence of the contents of a document could be given. Section 65(a) provides that secondary evidence of the contents of a document could be given when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved and when, after the notice mentioned in Section 66, such person does not produce it. Section 66 of the Evidence Act provides that secondary evidence of the contents of the documents referred to in clause (a) of Section 65 shall not be given unless the party proposing to give such secondary evidence has previously given notice to produce it to the party

in whose possession or power the document is. It is seen from the records that the first defendant had filed an application in the suit as I.A.No.4111 of 1993, seeking orders directing the fifth plaintiff to produce the will alleging that the said will is in her custody. The records indicate that the court below as per the order passed in the said application directed the fifth plaintiff to produce the document required to be produced or file an affidavit. It is also seen that pursuant to the said order passed by the court below, the fifth plaintiff has filed an affidavit stating that she is not in possession of the will. The plaintiffs have no case regarding the original of Ext.B1 will. The certified copy of the will indicates that the fifth plaintiff was given a life interest in respect of the plaint schedule property as per the terms of the will. In the said circumstances, the case set up by the first defendant that the original of the will was entrusted to the fifth plaintiff by the executant appears to be probable. I, therefore, hold that the first defendant was justified in adducing secondary evidence of the contents of the will relied on by him.

12. In the light of the provision contained in Section 68 of the Evidence Act, the execution of a will has to be proved by examining an attesting witness. Section 63 of the Indian Succession Act provides that an attester to an unprivileged will shall see the execution of the will by the testator and that he shall sign the will in the presence of the testator. DW2 deposed that he was one of the attestors to Ext.B1 will; that he saw Chami executing the will and that he has put his signature as an attesting witness to Ext.B1 will in the presence of Chami. True, in the Chief examination, Dw2 has not stated that Ext.B1 is the will which was attested by him. It is seen that after DW2 gave evidence in this case, he was summoned and examined again on 23.11.1995. On the second occasion, with reference to Ext.X1, the copy of the will summoned from the concerned Sub Registry, DW2 has stated that Chami had signed on Ext.X1 will in his presence. It is also seen that after the matter was remitted by this Court for fresh consideration, DW2 was again summoned and examined in the suit during 1992. True, while giving evidence on the third occasion, DW2 has stated that he

is not sure as to whether Exts.B1 and B4 are copies of the original will executed by Chami. In **K.M.Varghese v. K.M.Oommen** (AIR 1994 Kerala 85), this Court held that even in a case where the evidence of the attesting witness is vague, indefinite or doubtful, the court is entitled to consider the circumstances of the case and decide the question as to whether the requirements of the statute have been complied with. It is beyond dispute that the will claimed to have been executed by Chami on 28.8.1982 is a registered will. Ext.B1 certified copy of the will executed by Chami on 28.8.1982 indicates that Dw2 is an attesting witness to the said will. DW2 has categorically stated in his evidence that he was an attestor to the will executed by Chami and that Ext.X1 is a will attested by him. Ext.X1 is a copy of Ext.B1 will produced by the first plaintiff. True, when Dw2 was examined after 25 years, he expressed some doubt as to whether Exts.B1 and B4 are the copies of the will attested by him. Merely for the reason that DW2 has expressed some doubt as to whether Exts.B1 and B4 are the copies of the will attested by him about 25 years ago, it

cannot be said that the will has not been proved at all, especially when plaintiffs have no case that Chami had executed another will which was attested by DW2. As such, in the light of the decision of this Court in **K.M.Varghese v. K.M.Oommen** (supra), I hold that the will executed by Chami on 28.8.1982 has been duly proved.

13. True, the recitals in Ext.A1 partition deed would indicate that the plaint schedule property was jointly held by Chami and his sons. Ext.A1 does not indicate that the plaint schedule property was the joint family property of Chami and his sons. Even assuming that the plaint schedule property was the joint family property of Chami and his sons, they could only be regarded as co-owners of the property after the Joint Hindu Family System (Abolition) Act, 1975. Section 43 of the Transfer of Property Act provides that where a person erroneously transfers a property, such transfer would operate on any interest which the transfer may acquire in such property during the subsistence of the contract of transfer. Applying the same logic, there is no reason to think that there will be any

impediment for Ext.B1 will to operate on the interest Chami had over the plaint schedule property on his death. As such, there is no substance in the contention that Chami was not competent to execute Ext.B1 will.

14. The next question is as to whether Ext.B1 will has been revoked by Chami. Section 70 of the Indian Succession Act dealing with the revocation of the will reads thus:

“70. Revocation of unprivileged Will or codicil--No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.”

The plaintiffs have not established that Chami had revoked Ext.B1 will in the manner provided for in Section 70 of the Act. The case of the plaintiffs is only that in so far as Chami had executed Ext.A1 partition deed in respect of the very same

property and in so far as the original will is not forthcoming, it has to be inferred that Chami had revoked the same by destruction. A reading of Ext.A1 partition deed does not indicate that the same was a document executed by Chami with the intention of revoking Ext.B1 will. Ext.A1 does not also deal with the disposition in respect of the entire property covered by the will. Ext.A1, though styled as a partition deed, it is only a document by which Chami had parted with a portion of the property covered by the will. As per Ext.A1, Chami retained one half of the property covered by the will with the first defendant who is the legatee under the will. As such, it is difficult to infer that by the execution of Ext.A1 partition deed, Chami had revoked Ext.B1 will, especially when the partition deed does not refer to the will. The onus to prove that a will has been revoked by the testator lies on the person alleging revocation. True, according to English Law, if the will is not forthcoming on the death of the testator, it is presumed to have been destroyed. But, in India, having regard to the habits and conditions of the people, this presumption is applied with

considerable care and caution. As such, merely for the reason that the original of the will is not forthcoming, it cannot be inferred that Chami had destroyed the will. It is all the more so, when the first defendant has a specific case that the original of the will is in the possession of the fifth plaintiff, the wife of Chami, who is also a beneficiary of the will.

15. The suspicious circumstances surrounding the execution of the will as highlighted by the learned counsel for the appellants are that the female children of the testator have not been given any share in Ext.B1 will; that the first defendant has taken a prominent role in the matter of getting the will executed in his favour and that the will has not seen the light of the day. It is now settled that merely for the reason that a heir or a few heirs of the testator are excluded from inheriting the property of the testator, it cannot be contended that the will is vitiated on account of suspicious circumstances. As far as the present case is concerned, it is seen that even while Ext.A1 partition deed which was admittedly executed by Chami, his female children were never given any share in the property. In

this context, it is relevant to note that the first defendant has a specific case that the plaintiffs were given their due share in the family property at the time of marriage and it is on account of the said reason they were not given any share in Ext.B1 will. In the said circumstances, I am of the view that there was nothing unusual in Chami excluding the female children in the matter of inheriting his properties and the same cannot be taken as a suspicious circumstance vitiating the due execution of the will. I have already found that the non-production of the original will is not attributable to the first defendant. As such, the said circumstance also cannot be taken as a suspicious circumstance vitiating the due execution of the will. Regarding the role played by the first defendant in the matter of getting Ext.B1 will executed, the stand taken by the first defendant when he was examined initially before the court below was that he came to know of the execution of the will only after about four years. However, while he was examined on the second occasion, he has taken the stand that he had also gone with Chami to the Sub Registry for execution of the will. Merely for

the reason that a legatee under the will had accompanied the testator to the Sub Registry for executing the will, it cannot be said that he has taken a prominent role to get the will executed in his favour. I do not think that the said conduct on the part of the first defendant, even if it is true, would be a suspicious circumstance vitiating the due execution of the will.

In the result, the appeal is devoid of merits and the same is, accordingly, dismissed. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)