

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

RSA.No. 619 of 2011 (F)

AGAINST THE JUDGMENT AND DECREE IN AS NO. 16/2009 of III ADDITIONAL DISTRICT
COURT, KOZHIKODE DATED 23-02-2011

AGAINST THE JUDGMENT AND DECREE IN OS NO. 140/2004 of I ADDITIONAL SUB
COURT, KOZHIKODE DATED 26-11-2008

APPELLANT(S)(APPELLANTS IN THE LOWER APPELLATE LOWER AND DEFENDANTS 4 &
5 IN THE TRIAL COURT):

1. P.SIVANANDAN,AGED 54 YEARS,
S/O.P.RAGHAVAN, PARAMBALATH HOUSE, CHEVAYUR AMSOM
CHEVAYUR DESOM, KOZHIKODE TALUK
2. P.RADHAKRISHNAN,AGED 50 YEARS,
S/O.P.RAGHAVAN, PARAMBALATH HOUSE, CHEVAYUR DESOM
CHEVAYUR DESOM, KOZHIKODE TALUK

BY ADVS.SRI.R.D.SHENOI (SENIOR ADVOCATE)
SRI.N.M.MADHU
SRI.S.VINOD BHAT
SRI.LEGITH T.KOTTAKKAL

RESPONDENT(S)(RESPONDENTS IN THE APPELLATE COURT AND PLAINTIFFS 1 AND 2
AND DEFENDANTS 1 TO 3 IN THE TRIAL COURT):

1. HARSHALATHA P.,AGED 64 YEARS,
D/O.P.RAGHAVAN, AMBICHAM MEETHAL HOUSE
VELLIPARAMBA P.O., VELLIPARAMBA AMSOM
VELLIPARAMBA DESOM, KOZHIKODE TALUK-673 008
2. P.DINAKARAN, AGED 58 YEARS,
S/O.P.RAGHAVAN, PARAMBALATH HOUSE, NEDUNGOTTUR
AMSOM, NEDUNGOTTUR DESOM, CIVIL STATION
KOZHIKODE TALUK-673 020
3. P.SHYLAJANATHAN, AGED 62 YEARS,
S/O.P.RAGHAVAN, THAZHAKUNNATH HOUSE, KOTTAPARAMBA
MAYANAD AMSOM, MAYANAD DESOM, KOZHIKODE TALUK-673 008
4. P.MOHANDAS, AGED 60 YEARS,
S/O.P.RAGHAVAN, PARAMBALATH HOUSE, CHEVAYUR AMSOM
CHEVAYUR DESOM, KOZHIKODE TALUK-673 017

5. P.JAYAPRAKASAN, AGED 56 YEARS,
S/O.P.RAGHAVAN, PARAMBALATH HOUSE,CHEVAYUR AMSOM,
CHEVAYUR DESOM
KOZHIKODE TALUK-673 017

R1 & R2 BY ADV.SRI.K.B.SIVARAMAKRISHNAN
R3 BY ADV.SRI.K.SANEESH KUMAR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
16.07.2015, THE COURT ON 06-08-2015 DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.619 of 2011

Dated this the 6th day of August, 2015

JUDGMENT

Defendants 4 and 5 in a suit for partition raise a challenge against correctness and legality of the concurrent findings of two courts below, whereby a Will propounded by them was found to be not genuine and the suit was decreed rejecting their plea. Plaintiffs and other defendants are the respondents in this appeal. For the sake of convenience, the parties are referred to as the plaintiffs and defendants in the succeeding paragraphs.

2. Heard Sri R.D.Shenoi, learned Senior Counsel appearing for defendants 4 and 5 and Sri.K.B.Sivaramakrishnan, learned counsel for the plaintiffs.

3. Brief facts: Plaint B schedule property belonged to deceased Raghavan. First plaintiff is the daughter of deceased Raghavan and the second plaintiff and the defendants are his sons. He died on 05.02.1996. Plaintiffs would contend that he died intestate, whereas defendants 4 and 5 contended that he executed Ext.B31 Will with full testamentary capacity and got it registered. As per the said document, the property owned by him was bequeathed in favour of defendants 4 and 5. This document is

seriously challenged by the plaintiffs. According to the plaintiffs, after the death of Raghavan, the plaintiffs and defendants, as his legal heirs, are entitled to 1/7th right over the plaint schedule property. In spite of demand for partition, defendants 4 and 5 showed a volte-face. The plaintiffs caused a lawyer notice to be issued to defendants 4 and 5, to which a reply was sent taking an adamant stand against the claim for partition. Hence the suit was laid.

4. First defendant supported the plaint claim. Defendants 2 and 3 did not contest the suit. Defendants 4 and 5 filed a joint written statement stating that Ext.B31 Will was duly executed by their father for benefiting them. According to these defendants, deceased Raghavan was both mentally sound and physically fit till his death and he, out of his free will and volition, executed Ext.B31 Will. It is also contended that he was having testamentary capacity at the material time. Deceased Raghavan had specific reasons for benefiting defendants 4 and 5. He had filed a suit, O.S.No.313 of 1988, before the Munsiff's Court seeking permanent prohibitory injunction against the third defendant from trespassing into the plaint schedule property. Although the suit was later settled between the parties, the third defendant remained stranged with his father. Deceased Raghavan had given ten cents of property to the first defendant as per a settlement deed. He had given 5.18 cents of property in favour of the second defendant. His daughter was given in marriage and she is well

settled in life. Therefore, deceased Raghavan thought it fit to bequeath his remaining property in favour of defendants 4 and 5. He, on his own, executed Ext.B31 Will. Hence the property is not available for partition.

5. At the time of admission of the appeal, learned Single Judge framed the following substantial questions of law:

“1) Though presumption is that a document is executed on the date disclosed in the document, is not the presumption displaceable by evidence and if so, when the evidence of Dws. 2 and 3 is to the effect that Ext.B1 Will was executed on 23/6/1995, whether courts below were justified in holding that evidence of Dws. 2 and 4 that Will was executed on 23/6/1995 is not reliable is sustainable.

2) Whether finding of the courts below that as signature of the testator seen in Ext.B31 is shaky, it is a suspicious circumstance and therefore, Ext.B31 cannot be acted upon is sustainable.”

6. Learned Senior Counsel appearing for defendants 4 and 5 strongly contended that the courts below seriously erred in finding that the Will propounded by defendants 4 and 5 was not proved mainly by attaching undue importance on the date shown on Ext.B31 Will. Ext.B31 is a registered Will. It is the case of defendants 4 and 5 that it was duly executed by Raghavan with full consciousness. On the top of Ext.B31, the

date shown is 19.06.1995. It was presented for registration on 23.06.1995. The witnesses cited to prove the execution of Will testified that they signed the Will on 23.06.1995, the date on which it was presented for registration and actually registered. They do not have a case that deceased Raghavan put his signature on Ext.B31 or they attested the Will on 19.06.1995. The trial court in paragraphs 16 to 19 of the judgment considered the glaring incongruity between the case pleaded by defendants 4 and 5 in the written statement and the case proved at the time of evidence. In this context, it is relevant to consider the plea raised by defendants 4 and 5 in the written statement.

7. Learned counsel for the plaintiffs relied on paragraph 3 of the written statement and contended that there is a candid assertion by defendants 4 and 5 that the Will was executed by deceased Raghavan on 19.06.1995. He drew my attention to the following averments in the written statement: "The truth is that the plaint B schedule property which was the self acquisition of the father of these defendants, namely deceased Parambalath Raghavan, was bequeathed under the registered will dated 19th June 1995 registered as document No.66 in Book 3 of West Hill Sub Registry office, in favour of these defendants." In paragraph 4 of the written statement, defendants 4 and 5 stated as follows: "While the will was executed on 19th June 95 the same was presented for registration on 23.6.95 and was obtained back from the Sub Registry office by the 1st

identifying witness viz., attesor Shaji.” In paragraph 4 of the proof affidavit filed in lieu of the chief examination by the fourth defendant for himself and on behalf of the fifth defendant, it is stated that Ext.B31 Will was executed and registered on 19.06.1995. On the basis of these pleadings and evidence, learned counsel for the plaintiffs contended that the finding of fact arrived at by the courts below cannot be now challenged in this second appeal since it is consistent with the case of defendants 4 and 5 that their father had executed the Will in question on 19.06.1995. According to the learned counsel for the plaintiffs, the case that deceased Raghavan executed the Will on 23.06.1995 came out for the first time in the deposition of DWs 2 and 3.

8. Learned Senior Counsel based on the decision in **Pocker v. Khalid (1973 KLT 540)** contended that much significance cannot be attached to the date shown on Ext.B31 Will (as 19.06.1995) as the presumption that a document is executed on the date mentioned therein is a rebuttable one. In paragraph 4 of the judgment, the following proposition of law is laid:

“..... There is the initial presumption that a document is executed on the day mentioned in the document as the date of execution. Prima facie the date shown in the document may be accepted as the date of such execution and it is for the party who contends that the document was executed on

a different date to show that it was so. We need refer only to the decision in Kepoug Prospecting Ltd. v. Schmidt (1968 (2) WLR.55)."

Learned Senior Counsel therefore contended that there is nothing wrong in DWs. 2 and 3 deposing true facts before the court that the Will was executed on a date different from that is shown therein. But, it is to be remembered that the rebuttal must be by adducing satisfactory evidence, worthy of credence. Further, the question whether a party can be permitted to adduce evidence and rely on materials which are against his own pleadings are germane for consideration. It is well settled that facts pleaded alone can be permitted to be proved. No authority need be mentioned here to fortify the said principle, as the law on this point is too well settled. It is pleaded in the written statement in clear terms that the Will was executed by deceased Raghavan on 19.06.1995. Even when the fourth defendant tendered evidence he adhered to the pleadings, rightly so as he is not entitled to deviate from his pleading. For the first time, the theory of Raghavan executing the Will on its date of registration, i.e., on 23.06.1995 was brought out through DWs.2 and 3. Therefore, even if the broad principle, viz., the presumption that a document is executed on the date which it bears can be rebutted, is indisputable, the question here is whether the rebuttal evidence is legally acceptable, in view of the definite pleadings and the pitfalls in the defence case. The pleadings and proof

are at variance.

9. The plaintiffs and supporting defendants have raised a challenge that deceased Raghavan was not having testamentary capacity. He was bodily and mentally weak and infirm due to old age and ailments. Further, he was hospitalised frequently in connection with his fragile body condition. It is also the finding of the courts below that there are suspicious circumstances which could not be repelled by the propounders of the Will. According to the courts below, the irresistible conclusion from the totality of evidence is that Ext.B31 Will was not executed by deceased Raghavan with the required mental capacity.

10. Before going to the relevant facts in this case, it will be apposite to refer to the decision in **H. Venkatachala Iyengar v. B.N. Thimmajamma (AIR 1959 SC 443)**. It is well settled even before that decision, the onus of proof of a Will was laid on the propounder. **Venkatachala Iyengar's** case delineates the manner of appreciation of evidence and reminds the courts of their duties and responsibilities while examining the genuineness and acceptability of Wills. The relevant portions of paragraphs 18 and 20 to 22 in the above said decision read as follows:

“The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be

proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect

proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. 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 may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances above referred to in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is

no longer alive.

It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.”

Many decisions thereafter followed the view expressed in **Venkatachala Iyengar's** case and applied the principles with required modifications to suit the facts and circumstances in each case. The Supreme Court in **Indu Bala and v. Manindra Chandra (AIR 1982 SC 133)** has observed as follows:

“The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of

attestation prescribed in the case of a will by S.63 of the 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. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing

the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. Any and every circumstance is not a 'suspicious' circumstance. A circumstance would be 'suspicious' when it is not normal or is not normally expected in a normal situation or is not expected of a normal situation or is not expected of a normal person."

Regarding the suspicious circumstances shrouding a Will, the Supreme Court has made some observations, though they are not exhaustive, in **Bharpur Singh v. Shamsheer Singh((2009) 3 SCC 687)**. The relevant portion of the decision is quoted hereunder:

"Suspicious circumstances like the following may be found to be surrounded in the execution of a Will : (i) the signature of the testator may be very shaky and doubtful or not appear to be his usual signature; (ii) the condition of the testator's mind may be very feeble and debilitated at the relevant time; (iii) the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason; (iv) the dispositions may not appear to be the result of the testator's free will and mind; (v) the propounder takes a prominent part in the execution of the will; (vi) the testator used to sign

blank papers; (vii) the will did not see the light of the day for long, and (viii) incorrect recitals of essential facts. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not.”

Recently the Supreme Court in **Leela Rajagopal v. Kamala Menon Cocharan (AIR 2015 SC 107)** held that the unusual features appearing in a Will or the unnatural circumstances surrounding its execution will certainly justify a close scrutiny before the same can be accepted. It is the over all assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration.

11. Learned Senior Counsel submitted that the trial court had found out many reasons to hold that Ext.B31 Will was not genuine. It is also contended that most of the reasons mentioned by the trial court did not impress the mind of lower appellate court. This contention is strongly

opposed by the learned counsel for the plaintiffs. On a perusal of the trial court's judgment, it can be seen that while answering issue No.1, regarding the execution of Ext.B31 Will, the trial court had found that deceased Raghavan was not in good health condition and in sound state of mind to execute Ext.B31 Will and to this extent, the plaintiffs' contentions were believable. To arrive at that conclusion, the trial court placed reliance on the testimony of PW2, the doctor who treated Raghavan and Exts.A10 to A12 certificates. That court took note of Exts.38 to 40 also for holding that deceased Raghavan was undergoing continuous treatment. Fact that he was aged 78 years at the time of execution of Ext.B31 Will was also weighed with the trial court. Further, incongruity in respect of the date of execution of the Will pleaded and attempted to be proved through DWs 2 and 3 was also taken by the trial court as a suspicious circumstance. Yet another factor which prompted the trial court to hold that Ext.B31 Will was not properly executed by deceased Raghavan is the active role played by the fourth defendant (DW1) in its execution. It is come out in evidence that DWs 2 and 3 are friends and close associates of defendants 4 and 5. Learned counsel for the plaintiffs contended that DW1 himself admitted that his father was having a large friends circle and if he had really intended to execute a Will, he would have sought their help, instead of seeking the help of DW1's friends. According to the learned counsel for the plaintiffs, this amounts to

beneficiary of the Will taking a prominent role in its execution. Further, from the angle of a normal human conduct, deceased Raghavan would have disclosed his idea to execute a Will to his friends or close relatives, instead of getting it executed and registered through youngsters, who are closely connected to the beneficiaries of the Will.

12. Another improbability pointed out is that the properties although situated within the jurisdiction of Chevayoor Sub Registrar's Office, the Will was caused to be registered in the West Hill Sub Registrar's Office, a distant place. It had been elicited in evidence that deceased Raghavan executed some other documents in Chevayoor Sub Registrar's Office. Why Ext.B31 Will was registered in the West Hill Sub Registrar's Office was not properly explained.

13. Yet another important circumstance noticed by the court below is the shaky signatures of deceased Raghavan seen on Ext.B31 Will. It is also seen that on different pages of Ext.B31 the signatures, purported to be that of deceased Raghavan, are totally dissimilar to one another. That was also taken as a circumstance to pronounce against the genuineness of the Will.

14. The lower appellate court although did not elaborately consider these aspects, on the whole, agreed with the findings of the trial court. Learned counsel for the plaintiffs contended that according to DWs 2 and 3, the entire registration process concluded by 11 o' clock in the

morning on 23.06.1995, whereas the document was presented only at 2.30 p.m. on 23.06.1995. In answer to this contention, learned Senior Counsel contended that in cross-examination, the whole aspect was not purposely elicited from DWs 2 and 3 and they were misled to give answers indicating that they did not remain in the Registrar's Office till 2.30 p.m. on that date. It is to be noticed that the testimony of DWs 2 and 3 not only go against the pleadings raised by defendants 4 and 5, but failed to inspire confidence in the minds of two courts which dealt with the facts threadbare. It is come out in evidence that DW2 is a close friend of fifth defendant. It is the submission of the learned counsel for the plaintiffs that no satisfactory reason is brought out to think that deceased Raghavan wanted to benefit some of his children in preference to others. He never intended to deviate the course of natural succession to the property after his death.

15. Learned counsel for the plaintiffs strongly relied on Exts.B39 and B40 evidencing treatment given to deceased Raghavan from 11.07.1995 to 31.07.1995 for 'pakshavatham' (paralysis).

16. After considering the entire evidence - both oral and documentary - two courts came to the conclusion that deceased Raghavan was not having adequate testamentary capacity to execute the Will. Apart from the shaky signatures and incongruity in the pleadings and proof regarding the date of execution of the Will, the suspicious circumstances,

encompassing the Will, could not be effectively dispelled by the propounder and the witnesses examined on his side. Further, it is settled by the pronouncement of the Supreme Court in **Narinder Singh Rao v. AIR Vice-Marshal Mahinder Singh Rao ((2013) 9 SCC 425)** that the findings arrived at by the courts dealing with facts on testamentary capacity fall within the realm of questions of facts. Therefore those matters cannot be re-agitated in a second appeal. I do not find any illegality or perversity in reading the evidence by the courts below. The substantial questions of law can only be decided against the appellants (defendants 4 and 5). Hence I do so.

In the result, the appeal is dismissed.

All pending interlocutory applications will stand dismissed.

A. HARIPRASAD, JUDGE.

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