

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

RSA.No. 1084 of 2011

A.S.NO.50/2010 OF ADDITIONAL SUB COURT, KOLLAM

O.S.NO.24/2001 OF MUNSIF MAGISTRATE COURT, PARAVOOR

APPELLANT(S)/APPELLANT/PLAINTIFF NO.2 :

- * 1. B.SUDHARMANI, AGED 55 YEARS,
D/O.BHARGHAVI, EZHAMPAZHIKATH VEETIL,
(CHARUVILA VEEDU) KUNAYIL CHERRY, PARAVOOR VILLAGE,
KOLLAM TALUK.(DIED)

* ADDITIONAL APPELLANTS 2 TO 4 IMPEADED

2. BABURAJAN K.,
CHARUVILA VEEDU, KOONAYIL, PARAVOOR P.O.,
KOLLAM DISTRICT.
3. AJITH RAJ B., S/O.BABURAJAN K.,
CHARUVILA VEEDU, KOONAYIL, PARAVOOR P.O.,
KOLLAM DISTRICT.
4. SUJITH RAJ B., S/O.BABURAJAN K.,
CHARUVILA VEEDU, KOONAYIL, PARAVOOR P.O.,
KOLLAM DISTRICT.

- * LR'S OF THE DECEASED SOLE APPELLANT ARE IMPEADED AS ADDITIONAL APPELLANTS 2 TO 4, AS PER ORDER DATED 16.01.2014 IN I.A.NO.60 OF 2014.

BY ADV. SMT.PRABHA R.MENON

RESPONDENT(S)/RESPONDENTS/DEFENDANTS 1 AND 2 AND PLAINTIFF NO.1 :

1. N.DEVARAJAN, S/O.NARAYANAN,
BHAKTHANJALI, VAITTILA, THAIKOOTAM CHURCH ROAD,
ERNAKULAM- 682 019 (COCHIN PORT TRUST EXECUTIVE ENGINEER).
2. BABU RAJENDRAN, S/O.NARAYANAN,
AYOOR, VARKALA, CHIRAYINKEEZHU TALUK,
THIRUVANANTHAPURAM- 695 001.

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**\$ 3. N.DEVADASAN, EZHAMPAZHICATH VEETIL,
(OZHUKKUMPARA) MARANADU CHERRY, MEENADU VILLAGE,
KOLLAM- 691 001. (STRUCK OFF)**

**\$ R3 IS STRUCK OFF FROM THE PARTY ARRAY AT THE RISK OF
THE APPELLANTS, AS PER ORDER DATED 04.06.2013 IN I.A.NO.1468 OF 2013.**

**R1 BY ADV. SRI.SAJU.S.A
R2 BY ADV. SRI.M.DEVESH**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 17-11-2015, THE COURT ON 03-12-2015 DELIVERED THE FOLLOWING:**

Msd.

P.B.SURESH KUMAR, J.

R.S.A. No.1084 of 2011

Dated 3rd December, 2015.

J U D G M E N T

The second plaintiff in a suit for declaration is the appellant in this second appeal.

2. The plaint schedule properties belonged to Krishnan Narayanan, the father of the plaintiffs and defendants. During 1970, Krishnan Narayanan executed Ext.A1 gift deed in favour of the first defendant in respect of the plaint A schedule property. Later in the year 1988, Krishnan Narayanan executed Ext.A2 will in favour of the second defendant in respect of plaint B schedule property. According to the plaintiffs, Exts.A1 and A2 documents have been obtained by defendants 1 and 2 from their father fraudulently without disclosing the contents of the same. The relief claimed in the suit, in the circumstances, was a decree to set aside Exts.A1 and A2 documents. The defendants contested the suit by filing separate written

statements. According to them, Exts.A1 and A2 documents have been executed voluntarily by Krishnan Narayanan and the same are not vitiated on any ground whatsoever. The trial court dismissed the suit holding that the plaintiffs have not established their case that Exts.A1 and A2 documents are vitiated as alleged. The second plaintiff though challenged the decision of the trial court in appeal, the appellate court confirmed the decision of the trial court. Hence, this second appeal by the second plaintiff.

3. Heard the learned counsel for the appellant as also the learned Senior Counsel for the first respondent.

4. The allegations, on the basis of which Exts.A1 gift deed and Ext.A2 will were sought to be set aside, as contained in page 4 of the plaint, read as follows :

“ പിതാവായ കൃഷ്ണൻ നാരായണനെ പ്രതികൾ അമിതമായി സ്വാധീനിച്ചും ആധാരങ്ങളുടെ ഉള്ളടക്കം പിതാവിനെ ധരിപ്പിക്കാതെയും രഹസ്യമായും കൃത്രിമമായും ചതിവായും പ്രതികൾ പ്രതികളുടെ പേർക്ക്

ജനിപ്പിച്ചു വാങ്ങിയിട്ടുള്ളതാണ്."

Going by what is stated in the plaint, the case of the plaintiffs is that the documents referred to therein have been obtained by defendants 1 and 2 fraudulently by influencing their father without disclosing its contents. It is seen that the trial court as also the appellate court proceeded to decide the case on the assumption that the case set up by the plaintiffs in the suit is a plea of undue influence. Section 16 of the Indian Contract Act which defines "undue influence" reads thus :

16. "Undue influence" defined

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction

appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.”

A contract is said to be induced by undue influence only when relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. It is trite that a party impeaching a document on the vitiating grounds like fraud, undue influence etc. shall precisely state the particulars with sufficient details to enable the other side to meet their case. As far as the present case is concerned, there is no allegation in the plaint that defendants 1 and 2 are in a position to dominate the will of their father and that the documents referred to above have been obtained by them taking advantage of the said dominant position. On the other hand, the case of the plaintiffs is only that defendants 1 and 2 have obtained the documents from their father fraudulently by

influencing him without disclosing the contents of the same. Merely for the reason that the parties are related to each other, it cannot be presumed that one is in a position to dominate the will of the other. Further, it is also not correct to treat influence, as established by proof of relations of the parties, as undue influence, for, one naturally relies on others for advice and others will be in a position to dominate the will of the person to whom the advice is given. That would only prove influence and not undue influence. In the absence of any pleading in the plaint that defendants 1 and 2 were in a position to dominate the will of their father and that the disputed documents have been obtained taking advantage of the said dominant position, the case of the plaintiffs cannot be understood as a plea constituting undue influence.

5. The learned counsel for the appellant pointed out that the suit was dismissed for the sole reason that the plaintiffs have not established the case of undue influence. According to the learned counsel, in a case of this nature, the plaintiffs have no burden at all to prove that the documents are

vitiated by undue influence. On the other hand, according to the learned counsel, it is for the beneficiaries of the documents to prove that the documents are not vitiated. She relied on Section 16(3) of the Contract Act as also the decisions of the Apex Court in **Krishna Mohan Kul v. Pratima Maity**, [(2004) 9 SCC 468] and **Pratima Chowdhury v. Kalpana Mukherjee** [(2014) 4 SCC 196], in support of the said contention. I have held that the plea of the plaintiffs in the plaint cannot be treated as a plea of undue influence. Even assuming that the plea of the plaintiffs can be construed as a plea of undue influence, Section 16(3) of the Contract Act applies only when it is established that the relationship between the transacting parties was such that one party was in a position to dominate the will of the other and the transaction appears or proved to be unconscionable. In the instant case, as noticed above, there is not even an allegation in the plaint that the relationship between defendants 1 and 2 and their father was such that defendants 1 and 2 were in a position to dominate the will of their father. Further, the gift deed executed by the father in

favour of one of his children in respect of a portion of the property cannot be said to be an unconscionable document, especially when the donee has a case that the properties of the father were outstanding on a mortgage and the gift was executed when the donee liquidated the mortgage liability. Likewise, a will would not become unconscionable merely for the reason that the same is executed in favour of one of the children of the testator. There is, therefore, no merit in the contention advanced by the learned counsel for the appellant that the burden of proof to establish that the disputed documents were not vitiated was on the defendants.

6. The learned counsel for the appellant contended that Ext.A1 being a document required to be attested by two witnesses is attested by only one witness and as such, the same is invalid for non-compliance of the provisions contained in Section 123 of the Transfer of Property Act. She relied on the decision of the Apex Court in **N. Kamalam v. Ayyasamy**, [(2001) 7 SCC 503] in support of the said proposition. Ext.A1 gift is seen attested by two witnesses, viz., Sankaranasan

Janardhanan Pillai and Narayana Pillai Kesava Pillai. The complaint of the plaintiffs is that the second witness Narayana Pillai Kesava Pillai is the scribe of the document. According to the plaintiffs, the scribe of the document cannot be an attesting witness. Section 123 of the Transfer of Property Act requires that a gift shall be attested by two witnesses. There is no law which prohibits a scribe from attesting the document prepared by him. In a case of this nature, what is to be seen by the court is as to whether the scribe has put his signature with the intention of attesting the document. If the scribe has put his signature in the document only for the purpose of authenticating that he was the scribe of the document, he cannot be considered as an attesting witness. On the other hand, if the scribe has put his signature on the document with the intention of attesting the document, he can certainly be considered as an attesting witness. A perusal of Ext.A1 gift deed indicates beyond doubt that Narayana Pillai Kesava Pillai has put his signature in the document not for the purpose of authenticating that he was the scribe of the document. On the

other hand, the scribe is styled in the document as a witness. It is thus evident that the scribe of the document has put his signature in the document with the intention of attesting the document. There is, therefore, is no substance in this contention as well.

In the result, there is no merit in the second appeal and the same is accordingly, dismissed. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgs

(true copy)