IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 28TH JULY 2005 / 6TH SRAVANA 1927

RSA.No. 747 of 2005()

AS.107/1998 of DISTRICT COURT, KASARAGOD
OS.201/1995 of SUBORDINATE JUDGE'S COURT, KASARAGOD

APPELLANTS: APPELLANTS 1 TO 3: DEFENDANTS 1,4 & 5:

1. M.A.AHAMADKUNHI, AGED 65 YEARS,
S/O.ABDULLA HAJI, MUSLIM, LAND HOLDER,
R/AT NEAR KALANAD MOSQUE, KALANAD VILLAGE
AND POST, KASARAGOD TALUK.

2. M.A.MOHAMMED SHAFI, S/O.ABDULLA HAJI,
MUSLIM, LAND HOLDER, NOW AT M.A.AL-MAZROUI,GENERAL
TRADING EAST, POST BOX NO. 2151 ABU DHABI, UAE,
REPRESENTED BY HIS POWER OF ATTORNEY HIS WIFE
KHADIJA, MUSLIM HOUSEHOLD, R/AT AYYANGOLU,
KALANAD VILLAGE AND POST.

3. M.A.ABOOBACKER, S/O.ABDULLA HAJI,
MUSLIM, LAND HOLDER, NOW AR M.A.AL-MAZROUI,
GENERAL TRADING EAST, POST BOX NO.2151 ABU DHABI,
UAE, REPRESENTED BY HIS POWER OF ATTORNEY HIS
WIFE HAJARA, MUSLIM HOUSEHOLD, R/AT AYYANGOLU
KALANAD VILLAGE AND POST.

BY ADV. SRI.KODOTH SREEDHARAN

RESPONDENTS: RESPONDENTS: PLAINTIFF & DEFENDANTS 2 & 3:

1. M.A.FATHIMA BI, D/O.ABDULLA HAJI,
MUSLIM, LAND HOLDER, R/AT KALANAD IN
KALANAD VILLAGE AND POST, KASARAGOD TALUK.

2. M.A.MOIDU, S/O.ABDULLA HAJI,
MUSLIM, LAND HOLDER, R/AT NEAR MAVUNGAL
PETROL PUMP, MAVUNGAL HOSDURG TALUK,
P.O.ANANDASHRAMAM.

3. IBRAHIM, S/O.ABDULLA HAJI,
MUSLIM, LAND HOLDER, R/AT NEAR KALANAD IN
KALANAD VILLAGE AND POST, KASARAGOD TALUK &
DISTRICT.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 28/07/2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

R.S.A. NO. 747 OF 2005

Dated this the 28th day of July, 2005

JUDGMENT

Defendants 1,4 and 5 in a suit for partition, filed by the first respondent herein, are the appellants. The trial court decreed the suit granting 1/39 share to the plaintiff, which was confirmed by the appellate court. The parties are Muslims.

2. The plaint schedule property along with other properties belonged to the father of the plaintiff and defendants. After the death of the father, as per Ext.A1 partition deed dated 2.12.1985, the properties which belonged to him were partitioned among the plaintiff, the defendants and their mother. The plaint schedule property was allotted to the shares of the mother and defendants 4 and 5. Thereafter, the mother died. The plaintiff claims her share in the fractional interest of the mother in the plaint schedule property.

3. The first defendant contended that the mother had executed Ext.B1 Will on 25.9.1989 bequeathing her fractional right in favour of defendants 4 and 5 and after the death of the mother, the plaintiff and the first defendant consented to the disposition under the Will. Defendants 4 and 5 raised similar contentions as raised by the first defendant. However, they also contended that after the death of the mother, there was a talk and all the parties including the plaintiff consented to the disposition under the Will.

4. The plaintiff filed a rejoinder and contended that the Will is not true and genuine and that it was brought about by the defendants "in fraudulent collusion with each other and with the help of the scribe and witness with a view to defeat the right of the plaintiff in the suit properties". It was contended that the Will is not valid and

binding on the plaintiff or her fractional right in the properties.

5. Before the trial court, plaintiff was examined as PW1. In her evidence, she stated that there was no consent after the death of the mother as alleged by defendants 4 and 5. On behalf of the contesting defendants, the first defendant was examined as DW1, who is not a legatee under the Will and who claimed that he was a witness to the Will executed by the mother. The scribe was examined as DW2. DW3 is an advocate, who allegedly accompanied DW1 and others to the office of the scribe.

6. The trial court considered and analysed the oral evidence in the case and held that the evidence of DW1 to DW3 cannot be accepted to prove the genuineness of the Will. It was held that their versions in evidence are irreconcilable with each other and there are material contradictions in their evidence. It was noted by the trial court that

while executing Ext.A1 partition deed in the year 1985, the mother did not appear before the Sub Registrar's Office. Registration of the partition deed was effected at her residence. The plaintiff stated in her evidence that her mother was not having a sound disposing state of mind since a few years before her death, to fortify the contention that the Will is not genuine. The Will was allegedly executed on 25.9.1989 and the mother died in 1990. The evidence of PW1 would disclose that the mother was not even able to recognize her children. There is nothing to disbelieve the evidence of PW1. Her evidence also would indicate that she was on good terms with the mother through out and that she was with her mother at the time of her death.

7. It is contended in the written statement filed by the first defendant that there was consent of some of the legal heirs after the death of the testatrix while in the written statement of defendants 4 and 5 the contention is that all

the legal representatives consented to the Will after the death of the testatrix. However, no evidence was adduced at all to substantiate this contention. It is to be noted that PW1 denied this contention in her evidence. Still there is nothing in the evidence of DW1 that there was any such consent. He did not even state in his chief examination that there was any such consent. Defendants 2 and 3 are exparte and there is nothing to indicate that they consented to the Will after the death of the testatrix. Defendants 4 and 5 are the legatees under Ext.B1 Will. There is no evidence in the case to prove that all the legal heirs of the testatrix consented to the disposition under the Will after the death of the testatrix. Under the Mohammaden Law, a Will executed by a Mohammaden to a stranger is valid only in respect of one-third of the estate of the testator. If the bequest is in favour of a legal heir, it is invalid, unless all the legal heirs assent to the disposition after the death of the testator. Here, the disposition is in favour of

defendants 4 and 5, who are the legal heirs of the testatrix and, therefore, consent by all the legal heirs shall be proved.

8. The counsel for the appellants contended that the statement in the written statement of defendants 4 and 5 that all the legal heirs consented to the disposition under the Will after the death of the testatrix, is not denied by the plaintiff and, therefore, the contesting defendants are not bound to prove the consent at all. It is also contended by the counsel for the appellants that the only contention of the plaintiff is that the Will is not genuine and that it is a fabricated one. Once it is proved that the Will is executed, no further proof is required to accept the case of the defendants and the question of consent does not arise at all, particularly, when there is no denial of the averments in the written statement of defendants 4 and 5. The counsel for the appellants cited the Division Bench decision in **Kannan Nambiar** v. **Narayani**

Amma and others (1984 KLT 855) in support of this contention. That was a case where the plaintiff claimed exclusive right in respect of certain items as per a gift deed. In the written statement there was no specific denial of the execution of the gift deed. It is in that context it was held that when there was no specific denial of the execution of the gift deed, the plaintiff was not bound to prove the execution of the gift deed. The principle laid down in that decision cannot be applied at all in the case on hand since the question of denial does not arise here. In the suit for partition the plaintiff claimed that she has a share. When the defendants set up exclusive right under a Will, it is for them to plead and prove the same. When such a plea is made in the written statement, the plaintiff is not bound to file a rejoinder and deny the claim made by the defendants under the Will. It is enough if the plaintiff adduced evidence and in the evidence put forward the suspicious circumstances surrounding the execution of the Will. The burden of proof is

entirely on the defendant in such a case and the question of proof does not depend on the denial or otherwise, by the plaintiff, of the contentions raised in the written statement.

9. The counsel for the appellants contended that in the case on hand, a rejoinder was filed by the plaintiff and even then she did not deny the averment of consent put forward by the contesting defendants. In short, the contention is that the plaintiff having availed an opportunity to plead after the defendants filed the written statement and she having not denied in the rejoinder the contention of consent, the plea of consent shall be deemed to have been admitted. I am not inclined to accept this contention on two grounds: (1) The plaintiff is not bound to put forward such a contention in the rejoinder and she is not even bound to file a rejoinder; and (2) In the rejoinder the plaintiff has stated that the Will is not genuine and that it is a fabricated one. That implies that she

does not agree with the case of the defendants that the mother disposed of her rights in the properties in favour of defendants 4 and 5. When the case is denial of the disposition as such, there is no question of denial of consent. Denial of consent is implied therein.

10. It was next contended by the counsel for the appellant that the consent to the disposition under the Will by all the legal heirs need not be specific and it could be inferred from the surrounding circumstances. The consent could be implied, contends counsel for the appellants. In support of this contention he cited the decisions in **Abdul Kadir** v. **Hameedamma** (1988 (2) KLT 643) and in **Abdulkadar** v. **Pathumma** (1993 (2) KLT 1025). Counsel for the appellants also fairly submitted that there is a Division Bench decision in **Naziruddin** v. **Hajirambee** (2004 (1) KLT 896), which states a view different from that taken in 1988 (2) KLT 643 and 1993(2) KLT 1025. In 1988 (2) KLT 643, Justice

Padmanabhan held thus:

> "... Consent need not be express. It can be inferred from circumstances and conduct also. Even though the consent required is after the death of the testator, when alone the will takes effect, the conduct of the heirs during the life time of the testator with the knowledge of the disposition under the will could also be taken as a relevant factor in appreciating the state of affairs after his death to consider whether the bequest was consented to. Consent during the life time of the testator with knowledge of the bequest coupled with long silence after the death of the testator without claiming as heir must lead to the presumption of consent. Consent proved to have been given before death of the testator may hold good even after death if it is not revoked expressly or by necessary implication by conduct or otherwise. Passive acquiescence with knowledge of the disposition also can give rise to a presumption of consent. Such acquiescence can be inferred from long silence by heirs who could have otherwise claimed as heirs (See Anarali Tarafdar's case - AIR (38) 1951 Calcutta 7). But Izzul Jabbar Khan Azizul Jabbar and others v. Chairman, District Council Kuchery Ward Seeni District Chhindwara and others (AIR 1957 Nagpur 84) has laid down a conservative test in this respect... "

11. In 1988 (2) KLT 643, the learned single Judge relied on the decision of the Calcutta High Court in AIR 1951 Calcutta 7. The view taken by the Nagpur High Court in AIR 1957 Nagpur 84 is that it

would be impossible to imply consent of the heirs unless it is shown that they knew of the Will and its contents and deliberately stood by and allowed the Will to take effect. Something more than inaction, say by permission with knowledge was insisted.

12. In **Abdulkadar** v. **Pathumma** (1993 (2) KLT 1025), Justice M.M.Pareed Pillay (as His Lordship then was) held thus:

> ".. The consent need not be express. It may be signified by the conduct of the heirs showing their tacit approval of the will. The heirs whose rights are affected by the will can definitely consent to the same either expressly or impliedly. By passive acquiescence they can consent to the will executed by the testator. In the case where heirs did not challenge the will for a long time, the Court can certainly infer that they have really consented to it. In other words, where a Mohamedan by his will bequeaths more than one third of his whole property, consent of his heirs after his death can be gathered from the long course of conduct. It cannot be said that in every case express consent by the heirs has to be obtained and only in such a case the will is valid. ..."

A Division Bench of this Court in 2004 (1) KLT 896 relied on Chapter IX of the Principles of Mohammedan

Law by Mulla and held:

> "A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent."

The Division Bench also relied on the decision of the Karnataka High Court in **Narunnissa** v. **Sheik Abdul Hamid** (AIR 1987 Karnataka 222). The decisions in 1988 (2) KLT 643 and 1993(2) KLT 1025 were not brought to the notice of the Division Bench. In the present case, the defendants have not proved that there was any consent by the plaintiff either at the time of execution of the will or thereafter; either before or after the death of the testator. Therefore, there cannot be any presumption of consent by passive acquiescence with knowledge of the disposition as stated in 1988(2) KLT 643 and 1993 (2) KLT 1025.

13. The question considered by the courts below is whether the Will was executed by the testatrix or, in other words, whether the Will is a fabricated one.

The courts below held concurrently on the basis of evidence on record that the execution of the Will is not proved, that there are inherent improbabilities in the evidence of DWs.1 to 3 and that there are very many suspicious circumstances surrounding the execution of the Will. These findings were arrived at after analysing the pleadings, facts and circumstances of the case and the evidence on record. These findings being findings of fact, the appellants are not entitled to canvass the correctness of the same in the Second Appeal.

14. The plaintiff is undoubtedly a co-sharer and she is entitled to a fractional right. Her rights are sought to be defeated on the basis of an unregistered Will executed by a Mohammedan in favour of a legal heir. The execution of the Will is not proved, as held by the courts below. The consent of all the legal heirs of the testatrix after her death is also not proved by the contesting defendants. There is no ground for refusing the

legitimate share due to the plaintiff. The courts below rightly held that the plaintiff is entitled to get a share and no grounds are made out for interference in Second Appeal.

The Regular Second Appeal is, accordingly, dismissed.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

R.S.A.NO. 747 OF 2005

JUDGMENT

28th July, 2005
