IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 4TH DAY OF MARCH 2022 / 13TH PHALGUNA, 1943

RFA NO. 417 OF 2009

AGAINST THE JUDGMENT AND DECREE DATED 28.02.2009 IN OS NO.272/2000 OF ADDITIONAL SUB COURT, PALAKKAD

APPELLANTS/DEFENDANTS 1 AND 2:

1 KOUSALYA
W/O LATE THANKAPPAN, VADAKKEPURA VEEDU,
KEEZHATHUR VILLAGE, KOTTAYI AMSAM,
ALATHOOR TALUK.

2 SATHEESH (DIED)
S/O.LATE THANKAPPAN, VADAKKEPURA VEEDU,
KEEZHATHUR VILLAGE, KOTTAYI AMSAM,
ALATHUR TALUK.
(DEATH OF A2 RECORDED AS PER ORDER DATED 02.07.2019 IN MEMO DATED 24.06.2019)

BY ADVS.
SRI.G.SHRIKUMAR
SRI.G.SHRIKUMAR
SMT.KAVERY S THAMPI
SRI.SREEJITH S.NAIR

RESPONDENTS/PLAINTIFF AND DEFENDANTS 3, 5 & 6:

1 LEENA
W/O RAJAN, PULODIYIL, KARIYATHODI VEEDU,
MANKARA AMSHAM, PALAKKAD TALUK.

2 GIREESH
S/O.LATE THANKAPPAN, VADAKKEPURA VEEDU,
KEEZHATHUR VILLAGE, KOTTAYI AMSHAM,
ALATHOOR TALUK.

3 KASUMMA
D/O.LATE VEEMBAN, KARIYATHODU MANKARA AMSHAM,
PALAKAD TALUK.

4 LAKSHMI
W/O.LATE AYYAPPAN, CHENNAKKATTU VEEDU,
KOTTAYI AMSHAM DESAM, ALATHOOR TALUK,.
BY ADVS.
SRI.DEEPAK.B
SRI.T.C.SURESH MENON
SRI.P.S.APPU
SRI.C.A.ANOOP
SRI.JIBU P THOMAS
SRI.A.R.NIMOD

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 04.03.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

R.F.A No.417 of 2009

Dated this the 4th day of March, 2022.

JUDGMENT

P.B.Suresh Kumar, J.

Defendants 1 and 2 in a suit for partition are the appellants.

2. The suit properties, 14 items in number, are stated to be held by late Thankappan. The plaintiff is the daughter of Thankappan. First defendant is the wife and defendants 2 and 3 are the sons of Thankappan. The fourth defendant is the mother of Thankappan. The fourth defendant died pending suit and two of her daughters were impleaded as her legal representatives.

3. The case set out by the plaintiff is that

Thankappan died intestate on 01.05.1997 and the suit properties consequently devolved on the plaintiff and defendants 1 to 4. The prayer in the suit was, therefore, for partition of the one fifth share of the plaintiff over the suit properties.

4. The defendants contested the suit. In the written statement filed by the defendants on 02.04.2001, it was contended among others, that the suit properties have been acquired by Thankappan in his name making use of the funds provided by defendants 2 and 3 from abroad; that Thankappan had executed a will on 25.12.1996; that as per the terms of the said will, the plaintiff is disinherited, and that the plaintiff is therefore, not entitled to any relief in the suit. On 26.07.2004, the defendants filed an additional written statement, contending among others, that Thankappan had no right over plaint schedule item No.1 property; that the plaint schedule item No.6 property belongs to a trust and that the plaint schedule item No.12 is a property sold by the plaintiff and defendants together on the death of Thankappan.

5. The plaintiff gave evidence as PW1. Exts.A1 to A3 were the documents produced on the side of the plaintiff. Among the said documents, Ext.A1 is the notice issued by the plaintiff to defendants 2 and 3 on 15.12.1999 demanding partition of the plaint schedule properties and Ext.A2 is the notice issued by the plaintiff to the second defendant cancelling the power of attorney issued to him. The defendants examined a witness on their side as DW1 and marked Exts.B1 to B6 documents, of which Ext.B1 is the assignment deed executed by the second defendant in respect of plaint schedule item No.6 property on behalf of the plaintiff and others, Ext.B2 is the power of attorney executed by the plaintiff and defendants 1 and 3 in favour of the second defendant and Ext.B6 is the will propounded by defendants 2 and 3.

6. The court below did not render a positive finding as to whether execution of Ext.B6 will has been duly proved. The court below, however, rendered a finding that Ext.B6 will is not a genuine one. It was also found that plaint schedule item Nos.6 and 12 to 14 properties are not available

for partition. Consequently, a preliminary decree was passed directing that plaint schedule item Nos.1 to 5 and 7 to 10 shall be divided into forty five equal shares and ten each of such shares shall be allotted to the plaintiff and defendants 2 and 3, nine of such shares shall be allotted to the first defendant and three of such shares each shall be allotted to defendants 5 and 6. The court also directed that plaint schedule item No.11 property shall be divided into two hundred and seventy equal shares and forty such shares shall be allotted to the plaintiff and thirty six such shares shall be allotted to first defendant and eighty five each of such shares shall be allotted to defendants 2 and 3 and twelve each of such shares shall be allotted to defendants 5 and 6. Defendants 1 and 2 are aggrieved by the said decision of the court below. Hence this appeal.

7. Pending appeal, the second defendant died and his legal representatives have come on record.

8. Heard the learned counsel for the parties on either side.

9. The learned Senior Counsel for the first defendant and legal representatives of the second defendant contended that the crucial question which ought to have been considered by the court below in the case was the question as to whether Ext.B6 will was duly proved by its propounders, and the court below has not considered the said question at all. It was argued by the learned counsel, placing reliance on the evidence tendered by DW1, that it is a case where the will propounded by the defendants has been duly proved, and in the absence of any disposition in favour of the plaintiff in the will, the court below ought to have dismissed the suit. It was also contended by the learned counsel that the court below proceeded to hold that Ext.B6 will is not a genuine one on the ground that the testator has disinherited his only daughter and that the same is not a ground at all to hold that the will is not genuine. It was also argued by the learned counsel that insofar as the plaintiff contended that the execution of the will is shrouded by suspicious circumstances, it was obligatory for the plaintiff to establish such circumstances and no circumstances,

much less any suspicious circumstances, have been established by the plaintiff. The learned Senior Counsel did not, however, make any submission as to the correctness of the preliminary decree passed on the premise that Ext.B6 will is not a genuine one.

10. The learned counsel for the plaintiff in the suit did not make any submission as to the proof of Ext.B6 will. The attempt of the counsel, however, was to establish that the execution of Ext.B6 will is shrouded by suspicious circumstances. The learned counsel has made elaborate submissions on this aspect and we are not referring to the same for the present as we propose to deal with the same in detail in a short while later. The essence of the submissions made by the learned counsel was that insofar as the propounders of Ext.B6 will have not removed the suspicious circumstances surrounding the execution of the will, the court below cannot be found fault with for having not acted upon the will. The learned counsel has also relied on the decisions of the Apex Court in **H.Venkatachala Iyengar v. B.N.Thimmajamma,** AIR 1959

SC 443 and **Jaswant Kaur v. Amrit Kaur,** AIR 1977 SC 74, in support of his arguments.

11. In the light of the submissions made by the learned counsel for the parties, the point arises for consideration is whether the court below was justified in refusing to act upon Ext.B6 will.

12. The propositions of law as regards the nature and standard of evidence required to prove a will as explained by the Apex court in **H.Venkatachala Iyengar** have been succinctly stated by the Apex court in **Jaswant Kaur** as follows:

> "1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
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> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

> 5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.
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> 6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

As seen from the principles aforesaid, although the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will, cases in which the execution of the will is shrouded by suspicious circumstances stand on a different footing. Suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a

sound and disposable state of mind at the time when the will was made or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances would therefore make the initial onus of the propounder of the will heavier and in cases where the circumstances attended upon the execution of the will is shrouded by suspicions, the propounder must remove all those suspicions which are legitimate before the document can be accepted as the last will of the testator. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas certainly have to be proved by him, but even in the absence of such pleas, if there exist circumstances surrounding the execution of the will which give rise to a doubt as to whether the will is one duly executed by the testator, it is a part of the initial onus of the propounder to remove all those reasonable doubts in the matter and the test to be applied in this connection is satisfaction of judicial conscience.

13. Having thus understood the principles, let us now examine the point. Since the learned counsel for the plaintiff did not raise any argument as to the essential facts which go into the making of the will, the question to be examined in essence is as to whether there exist any circumstances which would throw a legitimate suspicion as to the execution of the disputed will.

14. The plaintiff is the only daughter of deceased Thankappan. Defendants 2 and 3, the sons of Thankappan, are the elder siblings of plaintiff. The plaintiff was married to none other than the son of the sister of Thankappan. The plaintiff was only in her twenties and Thankappan was aged 57 years when he is stated to have executed the disputed will. It has come out that the death of Thankappan was unexpected and was due to heart attack. As noted, going by the finding rendered by the court below, Thankappan had 9 items of immovable properties at the time when he executed the disputed will. It has come out that a few among the said properties were commercial properties and there was also a shopping complex in one of the

said properties. In Ext.B6 will, it is stated that no property is given to the plaintiff since she has been sent away in marriage giving necessary ornaments and all expenses in connection with her pregnancy have been met by the executant in accordance with the custom and practice and that in addition, the plaintiff has also been given cash on different occasions. It is also stated in the will that some of the properties included in the will have been acquired by the executant in his name making use of the funds provided by his children who are working abroad since 1987. The defendants do not have a case in the written statements filed by them that any item of immovable property has been given by Thankappan to the plaintiff at any point of time either before or after her marriage. They have also not let in any evidence to prove the amounts stated to have been given by Thankappan to the plaintiff as recited in the disputed will, not even formal, for if the amounts stated to have been paid by Thankappan to the plaintiff were substantial, there would certainly be documents evidencing such payments. Even the suggestion made by the defendants

at the time of the cross examination of the plaintiff was only that Thankappan had given a vehicle to the husband of the plaintiff. As noted, in the disposition made as per the disputed will, the plaintiff has been completely excluded. Even though exclusion of a heir from inheriting the estate, that too, in terms of the disposition made in a will, will not and cannot by itself lead to a legitimate suspicion as to the genuineness of the will, unfair and unjust disposition of property may at times lead to a legitimate suspicion as to the genuineness of the will. In such cases, as noted, the test to be applied for determining the question as to whether the will propounded is one to be acted upon or not being one of judicial conscience, the court would be certainly considering the question as to whether the explanation offered for excluding a heir from the disposition is reasonable on the facts and circumstances of the case. In the case on hand, having regard to the background of the parties narrated above, according to us, the reasons stated by a wealthy father, who has several items of properties, for excluding completely a young daughter like the plaintiff who is

in her twenties, from the disposition made by him in the form of a will, even if one or two items of properties included in the will were acquired by him in his name with the funds provided by others, do not appear to be reasonable and sufficient to remove the suspicion that arose on account of the unfair and unjust disposition of properties made in the manner indicated above. It is all the more so since the items of properties included in the will include the family properties as also properties acquired by the executant himself with his own funds prior to 1987.

15. There are other circumstances as well which would cause some suspicion as to the genuineness of the will propounded by the defendants. As noted, prior to the institution of the suit, the plaintiff has issued Ext.A1 notice to defendants 2 and 3 demanding partition of the suit properties. There was no reply whatsoever to the said notice. If, as a matter of fact, a will executed by Thankappan in respect of the properties regarding which demand was made for partition by the plaintiff was in existence, there was absolutely no reason why the said fact could not have been informed to the plaintiff on receipt of

the notice. Such a conduct is expected even in a case where the person issues a notice knowing fully well about the existence of the will, but pretending ignorance of the same. Of course, if there is a satisfactory explanation justifying the conduct in not sending a reply to the notice, there will not be any occasion for drawing an adverse inference as to the genuineness of the will. Of course, defendants have put forward an explanation for not sending a reply to the notice and the explanation offered is that the plaintiff was aware of the existence of the will. The said explanation, according to us, does not appear to be convincing and sufficient to remove a legitimate doubt as to the genuineness of the will, which arose on account of the conduct of the defendant in not sending the reply.

16. The specific case put forward by the plaintiff is that Ext.B6 will is a concocted one and the signatures appearing on the will as that of Thankappan are not put by him. The plaintiff has given evidence to that effect. In addition, in order to substantiate the said case, the plaintiff has filed an

interlocutory application as I.A.No.2522 of 2004 seeking orders calling for the specimen signatures given by the deceased Thankappan to the Catholic Syrian Bank, Kottayi Branch, and in terms of the order passed on the said interlocutory application, the card containing the specimen signatures of Thankappan maintained by the Bank was forwarded by the Bank to the court. Even though the specimen signature card of Thankappan was not proved in the manner expected, the plaintiff has asserted in her evidence that the signatures of Thankappan as appearing in the will and in the specimen signature card called for by the court are different, and the plaintiff has not been seriously cross-examined on this aspect.

17. The plaint schedule item No.12 property was one that admittedly belonged to deceased Thankappan. It was a property included in Ext.B6 will. On his death, the plaintiff together with defendants 1 and 2 sold the said property to one Kali. Ext.B3 is the sale deed executed by the plaintiff and defendants 1 and 2 in favour of Kali. The relevant recital in Ext.B3 sale deed reads thus:

> "താഴെ പട്ടികയിൽ വിവരിക്കുന്ന വഹകൾ പൂമുള്ളി മന വക ജന്മവും അവിടെനിന്നും മുൻപുതന്നെ യാതൊരു ദ്രവ്യ അവകാശവും കാലനിർണ്ണയവും കൂടാതെ വാക്കാൽ ഞാറുപാട്ടക്കൊണ്ടാവശ്യത്തിലേക്കായി ഞങ്ങളിൽ ഒന്നാം നമ്പർകാരിയുടെ ഭർത്താവും രണ്ടും മൂന്നും നമ്പർ കാരുടെ അച്ഛനും ആയ ടി തങ്കപ്പൻ എന്നവർ പാട്ടതിനെറ്റു വാങ്ങി നികുതി പാട്ടം കൊടുത്തു വെരും പാട്ട അവകാശത്തിന്മേൽ യെതാർത്ഥ അവകാശം വെച്ചും വന്നിരുന്നതും ടിയാന്റെ മരണ ശേഷം ഭാര്യാമക്കളും പിന്തുടർച്ച അവകാശികളുമായ ഞങ്ങൾക്കുമാത്രമായി പൂർണ ക്രയ വിക്രയ സ്വാതന്ത്ര്യ സഹിതം ലയിച്ചു സിദ്ധിച്ചതും."

If as a matter of fact, there was in existence of a will executed by deceased Thankappan in respect of the said property, it was unnecessary for the plaintiff to join as a party to a document in the nature of Ext.B3. This is another circumstance highlighted by the plaintiff casting suspicion on the genuineness of Ext.B6 will. In the additional written statement filed by the defendants, it was explained by the defendants that the plaintiff was included as a party to the document as insisted by the purchasers of the property. The defendants have not given any evidence, not even formal to substantiate the said stand. Even otherwise, in the light of the peculiar facts and circumstances of

the case, the said explanation does not appear to be convincing.

In the light of the aforesaid discussion, we do not find any reason to interfere with the finding rendered by the court below that Ext.B6 will is not a genuine one. The appeal is without merits and the same is accordingly dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.

YKB