2025:KER:48450

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

FRIDAY, THE 4TH DAY OF JULY 2025 / 13TH ASHADHA, 1947

RSA NO. 1211 OF 2018

AGAINST THE JUDGMENT AND DECREE DATED 12.10.2018 IN AS NO.26 OF 2015 OF ADDITIONAL DISTRICT COURT - IV, PATHANAMTHITTA ARISING OUT OF THE JUDGMENT AND DECREE DATED IN OS NO.282 OF 2008 OF MUSNIFF COURT,ADOOR

APPELLANTS/RESPONDENTS/DEFENDANTS:

1 JAYASREE
AGED 48 YEARS
D/O. VIJAYA LAKSHMI AMMA, THARUPOTTIL HOUSE,
MUDIYOORKONAM MURI, PANDALAM VILLAGE, PRESENTLY
RESIDING AT MANNICHINETHU KIZHAKKETHIL HOUSE,
ULAVUKKATTU MURI, PALAMEL VILLAGE, PIN-690 504

2 APARNA
AGED 22 YEARS
D/O. JAYASREE,-DO-DO.,
BY ADV SRI.K.P.SREEKUMAR

RESPONDENT/APPELLANT/PLAINTIFF:

SINDHU AJAYAN
AGED 39 YEARS
PLAKKOTTIL HOUSE, MUDIYOORKONAM MURI,
MUDIYOORKONAM P.O., FROM THARUPOTTIL HOUSE,
MUDIYOORKONAM MURI, PANDALAM VILLAGE, PIN-689 516

BY ADVS.
SRI.ALEXANDER JOSEPH
SMT.AKHILASREE BHASKARAN
SHRI.ANTONY NIKHIL REMELO
SHRI.AJITH SUNNY

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04.07.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2025:KER:48450

'C.R'

EASWARAN S., J.

R.S.A No.1211 of 2018

Dated this the 4th day of July, 2025

JUDGMENT

The appeal arises out of the reversal of the judgment and decree granted by the Munsiff Court, Adoor, in O.S.No.282/2008 by the Additional District Court – IV, Pathanamthitta, in A.S.No.26/2015.

2. Initially, this appeal was dismissed at the admission stage by judgment dated 08.01.2019. Aggrieved by the same, the appellant preferred SLP(C) No.7618/2019, which was converted to Civil Appeal No.2697/2024 and was ordered by the Hon'ble Supreme Court by order dated 20.02.2024, setting aside the judgment and remanding the appeal back for fresh consideration and also for framing questions of law. Accordingly, by order dated 08.04.2024, this Court admitted the appeal and framed the following questions of law:

> *(1) Whether the First Appellate Court is justified in raising issues which do not have any foundation in the pleadings?*
>
> *(2) Whether disinheriting a legal heir is, by itself, a suspicious circumstance?*
>
> *(3) Whether the First Appellate Court went wrong by going suo motu into the question of genuineness of Ext.B2 Will, when the same was not at all under challenge in the suit, the execution of which was explicitly admitted by the respondent and the cancellation which was not at all sought for by the respondent/plaintiff?*

3. The brief facts necessary for the disposal of the appeal are as follows:

The defendants in a suit for partition resisted the claim for partition based on a Will executed by one Damodara Panicker. Damodara Panicker married Sankari Amma and had two children, the plaintiff and late Saranya, who passed away on 04.07.2002. Sankari Amma died on 19.02.1995 and Damodara Panicker married the 1st defendant – Smt.Jayasree on 26.06.1995. On 03.11.1995, he executed a Will in favour of Smt.Jayasree and late Saranya. However, there was a clause in the Will was inserted by which the legacy would lapse on the death of Saranya or if she had died issueless after marriage and that the property will revert to Smt.Jayasree, who is the second wife of late Damodara Panicker. The plaintiff contended that she is entitled for the partition of the plaint schedule property and one third share to be allotted to her. Later, when the defendants appeared and contested the suit by raising a defense based on Ext.B2 Will, the plaintiff sought amendment of the plaint questioning the validity of the Will insofar as the share of Saranya getting lapsed on account of her death. The said application was however dismissed, but still, the plaintiff proceeded to contest the suit without questioning the said rejection of the amendment. Initially, the suit was dismissed by judgment and decree dated 26.02.2013. Aggrieved by the judgment

and decree, the plaintiff preferred A.S.No.111/2013 and by judgment dated 09.07.2014, the dismissal of the suit was set aside, and the matter was remanded back for fresh consideration by the First Appellate Court. Pursuant to the remand, the Trial Court by judgment dated 28.10.2014 dismissed the suit, since the defendants were able to prove the Will in accordance with Section 68 of the Indian Evidence Act, 1872, by examining the attesting witness. On appeal by the plaintiff, the First Appellate Court reversed the judgment of the Trial Court and decreed the suit finding that the execution of Will is surrounded by suspicious circumstances. Thus, the defendants are before this Court in the present appeal.

4. Heard, Sri.K.P.Sreekumar – learned counsel appearing for the appellants/defendants and Sri.Alexander Joseph – learned counsel appearing for the respondent/plaintiff.

5. Sri.K.P.Sreekumar - learned counsel appearing on behalf of the appellants, pointed out that the parties are bound by the remand order passed by the Appellate Court on 09.07.2014. With the defendants having complied with the requirement of examining the attesting witness, the plaintiff cannot turn around and contend that the Will was surrounded with suspicious circumstances. The Trial Court did not entertain any doubt as regards the execution of the Will. However, the First Appellate Court framed certain points suo motu and

decided that the Will was vitiated because the propounder could not dispel the suspicious circumstances and therefore, the judgment impugned in the appeal cannot be sustained.

6. On the other hand, the learned counsel appearing for the respondent - Sri.Alexander Joseph, would submit that the exclusion of the plaintiff, who is the daughter out of the first wedlock, is certainly a suspicious circumstance. The Will is vitiated by fraud and coercion and thus Section 61 of the Indian Succession Act, 1925, comes into operation and therefore, the First Appellate Court was justified in decreeing the suit. In support of his contentions, he relied on the decisions of the Hon'ble Supreme Court in ***Shivakumar & Ors. v. Sharanabasappa & Ors [(2021) 11 SCC 277]***, ***Srinivasa S.R. v. S. Padmavathamma [(2010) 5 SCC 274]*** and ***Laxmanan K. v. Thekkayil Padmini & Ors. [(2009) 1 SCC 354]***.

7. I have considered the rival submissions raised across the Bar and have perused the judgment of the courts below and also the records.

8. As stated above, one of the prime consideration which this Court must bestow upon is as regards the exercise undertaken by the First Appellate Court in formulating certain issues which did not have any foundation in the pleadings. This question assumes significance

especially since the First Appellate Court formulated certain questions by itself and did not deem it appropriate to grant an opportunity to the defendants to answer those questions. On a larger perspective, whether the First Appellate Court could formulate suo motu points touching upon a possible suspicious circumstances surrounding the Will. It is pertinent to mention that the Trial Court did not entertain any such suspicious circumstances. Therefore, on appeal, when the First Appellate Court is judging whether the Trial Court was justified in dismissing the suit, could not have entertained its own observations regarding the suspicious circumstances that allegedly surrounds the Will. Therefore, it is inevitable for this Court to hold that the issues raised by the First Appellate Court did not have the foundation in the pleadings.

9. In ***Rajagopal Vs Kishan Gopal [AIR 2003 SC 4319]***, the Supreme Court held that court could not have gone into certain findings even if some evidence was adduced. Therefore it is clear that, the questions formulated by the First Appellate Court had no legal foundation in the pleadings of the plaintiff.

10. However, Sri.Alexander Joseph - learned counsel for the respondent/plaintiff, submitted that it is the duty of the propounder to dispel any suspicious circumstances and that to establish the presence of suspicious circumstances, there need not be any foundation in the

pleadings. The above argument is solely based on the decision of the Hon'ble Supreme Court in ***Shivakumar*** (supra).

11. However, it must be noticed that the appellant herein was completely taken by surprise on the views expressed by the first appellate court. It is not clear from the reading of the decision of the first appellate court that the appellant was given an opportunity to explain the alleged suspicious circumstances entertained by the court. This is more so when, during the examination of PW1, she admitted the execution of the Will by her father, late Damodara Panicker. However, it is also pertinent to mention that the application for amendment filed by the plaintiff, questioned only the reversion of the share held by Saranya, her sister, to the second wife of late Damodara Panicker.

12. A perusal of the affidavit accompanying the application shows that the plaintiff had accepted the Will. Request for amendment was turned down by the Trial Court which has not been carried forward and the same is admitted by PW1 in her evidence. It is true that mere admission by the plaintiff regarding the 'Will', will not *ipso facto* enable the defendants to contend that the Will need not be proved in terms of Section 68 of the Evidence Act. But the defendants could always contend that the admission of the Will by the plaintiff would prove a long way to show the genuineness of the Will.

The defendants having succeeded in examining the attesting witness and thereby complying with the mandate under Section 68 of the Evidence Act, was successful in proving the execution of the Will. On a close reading of the oral testimony of DW1, the 1st defendant, as well as DW2, the attesting witness, it is clear that the plaintiff could not elicit any substantial contradiction or generate any suspicious circumstances as regards the execution of the Will.

13. The next question to be considered is as regards the unnatural disposition in the "will". The question whether an unnatural disposition in a 'will' constitutes a suspicious circumstance or not, has always been a disputable point. There are divergent views on the proposition.

14. In ***Hall v. Hall [(1868) LR 1 P&D P 481]***, Sir.J.P.Wilde summarized the law thus,

> "……*But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution , or like -these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has the courage to resist, moral command asserted and yield to for the sake of peace and quite or of escaping from distress of yielded to for the sake of peace and quiet or of escaping from distress of mind or social discomfort, there's if carried to a degree in which the free play of the testator's judgment, discretion, or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not drive: and his will must be the offspring of his own*

volition, and not the records of someone else's."

15. As far as Indian law is concerned, the Succession Act 1925. Section 61 enacts that:

> *"61- Will Obtained by frauds , coercion or importunity-*
>
> *A will or any part of a will, making of which has been caused by fraud, or coercion or by such importunity as takes away the free agency of the testator is void."*

16. Section 61 of the Succession Act 1925 came up for consideration before the Supreme Court in ***Naresh Charan Das Gupta v. Paresh Charan Das Gupta [(1954) 2 SCC 800]*** The Supreme Court quoted with approval the passage in ***Hall v. Hall*** and held that "even if the disposition in the will were unnatural in that the appellant had been practically disinherited and his children altogether ignored, this by itself cannot lead to any inference of undue influence. On the part of the first respondent….." Further in Para 11 it was held. "it is elementary law that it is not every influence which is brought to bear on a testator that can be characterized as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion - it has often been observed that undue influence may in the last analysis brought under one or other of these categories - the will cannot be attacked on the ground of undue influence."

17. Pertinently, the above decision was rendered by a four member bench and when ***Shivakumar*** (supra) was rendered the binding precedent of a larger bench was not noticed by the Supreme Court. Therefore, this court is bound to apply the decision of the larger bench in ***Naresh Charan Das Gupta*** (supra) and not ***Shivakumar*** (supra).

18. Moreover, as argued by the learned Counsel for the Respondent, it is not a case of unnatural disposition. Here, late Damodara Panicker, the testator, had preferred his second wife as the legatee instead of the plaintiff/his daughter. The reason why the testator preferred his second wife over his daughter from first wedlock is best known to the testator alone. It is not for the court to sit on a roving enquiry as regards the said disposition and hold that the same is unnatural. At any rate, preferring a legal heir over another heir cannot be termed as unnatural disposition. On contrary, the testator had given Item no.2 of Ext.B2 Will to Saranya, his second daughter from the first wedlock. However, the problem arose because testator provided the lapsing of legacy if Saranya died before the death of the testator, the legacy would revert back to the 1st defendant.

19. The first appellate court formed an opinion that because of the clause in Ext.B2 Will, wherein the legacy in favour of Saranya is said to have lapsed created a suspicious circumstance. This court

could not find any rationale behind this finding. Read as may, this Court could not persuade itself to hold that the presence of the said clause is a suspicious circumstance. This is more so because even going by the provision of Succession Act 1925, if the legatee does not survive the testator the legacy lapses. Section 105 of the Succession Act 1925 reads as under-

> *"105- In what case legacy lapses :-*
>
> *(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.*
>
> *(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator."*

When the statute itself provides for lapsing of the legacy, it passes ones comprehension as to how the first appellate court entertained a doubt as regards the same, as amounting to the suspicious circumstances. The Will, stated to be the intention of the last wish of the dead person, the courts cannot sit in and conduct a roving enquiry as to the circumstances surrounding the execution of Will by which one of the legal heirs were excluded. The courts are required to accept the last testament of the testator rather than disbelieving it. Viewed in this perspective, this Court cannot but answer the second question of law in favour of the appellant.

20. The learned counsel for the respondent/plaintiff raised a

serious dispute as regards the manner of execution of Ext.B2 Will. According to him, the First Appellate Court had rightly found that the Will was surrounded by suspicious circumstances. It is a specific case that the conditions prescribed under Section 61 of the Indian Succession Act is attracted in the present case. The testator was aged 45 years at the time of execution of the Will and that his second daughter was only 2¾ years of age. The Will happened to be executed within five months of his remarriage and therefore, it shows the influence exerted by the 1st defendant on the testator. It is in this context that the learned counsel for the respondent/plaintiff submitted that the First Appellate Court was justified in formulating the issues regarding the suspicious circumstances surrounding the Will. However, this Court is afraid that the contention cannot be accepted in view of the specific admission by the plaintiff during the cross-examination as regards the Will. She had no case that the Will was surrounded by suspicious circumstances.

21. In ***Derek A.C. Lobo & Ors. v. Ulric M.A. Lobo (dead) by Lrs & Ors. [2023 SCC Online 1893]***, the Hon'ble Supreme Court held that once the burden of proof is discharged by the propounder in terms of Section 63 of the Succession Act and 68 of the Evidence Act and by adducing *prima facie* evidence proving the competence of the testator, the onus is on the contestant opposing to show *prima facie*

the existence of suspicious circumstances so as to shift the onus on the propounder to dispel them. The Supreme Court further held that without knowing the circumstances, which according to the contestant opposing are suspicious, the propounder cannot dispel them and convince the court about his genuineness and validity. Thus, the Supreme Court concluded that the contestant opposing the Will has to raise surrounding suspicious circumstances specifically and not vaguely or in a general manner. Paragraph 16 of the judgment is extracted hereunder:

> *"16. In the light of the aforesaid decisions, it can be safely said that once the burden to prove is discharged by the propounder in terms of Section 63 of the Succession Act and Section 68 of the Evidence Act, and by adducing prima facie evidence proving the competence of the testator, the onus is on the contestant opposing to show prima facie the existence of suspicious circumstances so as to shift the onus on the propounder to dispel them. Without knowing the circumstances, which according to the contestant opposing are suspicious, how will the propounder be able to dispel them and to convince the court about its genuineness and validity. We are saying that the contestant opposing the Will has to raise surrounding suspicious circumstances specifically and not vaguely or in a general manner. A case of well-founded suspicion has to exist to cause shifting of onus back to the propounder once he discharged his burden to prove the execution of the Will. We may hasten to add that we shall not be understood to have held that failure of the party/parties to plead suspicious circumstances would automatically make the court to take a Will as validly proved even where the circumstance(s) raising doubt is inherent in the document. Certainly, in such circumstances the propounder has to convince the court and dispel such suspicious circumstances."*

22. From the *ratio decidendi* culled out from the decision of the Hon'ble Supreme Court in ***Derek A.C. Lobo*** (supra), the judgment of the First Appellate Court is clearly erroneous and cannot

be sustained. Therefore, answering the third question, it is held that in the absence of any specific challenge in the suit regarding the genuineness of Ext.B2 Will, the First Appellate Court could not have entertained the plea of the plaintiff.

Resultantly, the questions of law raised being answered in favour of the appellants, it becomes inevitable for this Court to hold that the judgment of the First Appellate Court requires to be interfered. Accordingly, this appeal is allowed by reversing the judgment and decree passed by the Additional District Court – IV, Pathanamthitta, in A.S.No.26/2015 and restoring the judgment and decree of the Trial Court in O.S.No.282/2008. No order as to cost.

Sd/-

EASWARAN S.,JUDGE

ACR