A ROSAMMAL ISSETHEENAMMAL FERNANDEZ (DEAD) BY LRS. AND ORS.

v.

JOOSA MARIYAN FERNANDEZ AND ORS.

AUGUST 9, 2000

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[A.P. MISRA AND Y.K. SABHARWAL, JJ.]

Indian Evidence Act, 1872 :

S.68, proviso—Suit for partition—Defendant claiming through gift deed—
C *Plaintiff alleging the document to have been brought fraudulently—Suit decreed by trial court—Execution of gift deed disbelieved—Defendant's appeal allowed—High Court dismissed plaintiff's second appeal holding that there was no specific denial by plaintiff and the proviso to s.68 would apply—Held, High Court erred in drawing the inference—There is a clear denial by the*
D *plaintiff of execution of the document—None of attesting witness examined—Execution of gift deed not proved—In view of non-compliance of s.68, gift deed could not be tendered in evidence—Plaintiff has successfully challenged its execution—No right accrued to defendant under the said gift deed—Findings recorded by High Court to the contrary set aside.*

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3037 of 1991.

From the Judgment the Order dated 20.7.90 of the Kerala High Court in S.A. No. 901 of 1983-G.

G. Vishwanatha Iyer and M.A. Firoz for the Appellants.

F S. Padmanabhan and G. Prakash for the Respondents.

The following Order of the Court was delivered :

Heard learned counsel for the parties.

The short question raised is, whether the High Court was right to enter-
G tain Exhibit B-1 in evidence, in view of proviso to Section 68 of the Indian Evidence Act.

The short facts are, the appellants filed the suit for partition of the plaint Schedule property claiming 2/5th share as parties are Roman Catholic Christians of Latin rite and as per custom in the community, both daughters and sons
H get equal share. The appellant also challenged the execution of the gift deed

Exhibit B-1 and the Settlement Deed Exhibit B-2. The trial court dismissed the suit with the finding that the plaintiffs have not proved the existence of any custom, by which the male and female heirs share equally to the property of a deceased dying intestate. The claim of the property is from Jossa Mariyan Fernandez (deceased). The court held that Jaius Fernandez was not in a position to execute the documents on the alleged date i.e. the 12th of November, 1973. Aggrieved by the same, the appellants filed an appeal. The appellate court, after permitting to bring on record, two additional documents, remanded the case back for fresh determination. After remand the trial court decreed the suit and held that the custom alleged has been proved and disbelieved the execution of the said two documents. The respondents' appeal by the appellate court was allowed and the trial court judgment was set aside. The appellant's second appeal was dismissed. The High Court held the issue of custom has become irrelevant in view of the decision of this Court that succession among Christians in Travancore is governed by Indian Succession Act under which daughter also gets right to succeed. However, considering the execution of the said two documents with reference to the gift deed which we are concerned, in the absence of any of the attesting witness being examined, the High Court held as there was no specific denial of this document by the plaintiff hence, proviso to Section 68 of the Evidence Act will apply.

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The High Court records;

> "In fact, in this case there is no specific denial of the execution of the documents and it is really a case for setting aside the documents on the ground of vitiating circumstances and in such a case, it is difficult to infer a specific denial of the execution of the documents within the meaning of that proviso."

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The finding of the High Court is challenged by the learned counsel for the appellant. He submits that actually there is specific denial of the execution of this document but the High Court has perfunctorily considered this. The existence of denial is very clear in the pleading itself. Both the High Court and the appellate court drew this inference based on the testimony of PW-5. The relevant portion of the High Court order is quoted hereunder:

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> "Even PW-5 had to admit that he and his brother DW-3 signed in the document on the particular day after the document was prepared at their office and that Jusa Maryan Fernandez was present there then."

Similarly, relevant portion of the appeilate court reads as under:

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A "But in cross examination he admitted that Exhibit B-2 is a settlement deed executed by Joosa Marian Fernandez and that the document was also prepared as per the directions of the executant. DW-3 is the document writer who prepared both these documents."

It is this part of the testimony which seems to have favoured the courts B to construe that there was no specific denial.

We find the High Court committed error by drawing such inference. In considering this question, whether there is any denial or not it should not be casually considered as such finding has very important bearing on the admissibility of a document which has important bearing on the rights of both the C parties. In fact the very finding of the High Court; "it is difficult to infer a specific denial of the execution of the document" shows uncertainty and vagueness in drawing such inference. In considering applicability of proviso to Section 68 the finding should be clearly specific and not vaguely or negatively drawn. It must also take into consideration the pleadings of the parties which D has not been done in this case. Pleading is the first stage where a party takes up its stand in respect of facts which they plead. In the present case, we find that the relevant part of the pleading is recorded in the judgment of the trial court dated 17th August, 1977 which is the judgment prior to the remand.

The judgment records the pleadings to the following effect:

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"The gift deed No. 1763/73 and settlement deed No. 1764/73 were brought into existence fraudulently without the knowledge and consent of Jaius Mariyan Fernandus. On the date of the alleged execution of the above said two documents Jaius Mariya Fernandus was confined to bed due to paralysis. At that time he was not in a position to execute F any document. In executing the documents defendants 1 and 2 forged the signature of their father after influencing the sub-registrar."

The aforesaid pleading leaves to no room of doubt about denial of execution of the said documents. The pleading records, that defendant Nos. 1 and 2 forged the signature of the father after influencing the sub-registrar. The G denial cannot be more stronger than what is recorded here. Once when there is denial made by the plaintiff, it cannot be doubted that the proviso will not be attracted. The main part of Section 68 of the Indian Evidence Act puts an obligation on the party tendering any document that unless at least one attesting witness has been called for proving such execution the same shall not be used H in evidence.

"Section 68 of the Indian Evidence Act; A

"*68. Proof of execution of document required by law to be attested:-* If a document is required by law to be attested, it shall not be used as evidence until 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 B evidence;

Provided that it shall not be necessary to call at attesting witness in proof of the execution of any, document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, XVI of 1908 unless its execution by the person by whom C it purports to have been executed is specifically denied."

Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered is not specifically denied. Therefore, every- D thing hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. In the present case as we have held, there is clear denial of the execution of such document by the plaintiff, hence the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed Exhibit B-1 is not proved. E Admittedly in this case none of the two attesting witnesses has been produced. Once the gift deed cannot be tendered in evidence in view of the non-compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution. The gift deed accordingly fails and the findings of the High Court to be contrary are set aside. In view of this no right F under this document accrue to the concerned respondent over Schedule A property which is covered by this gift deed.

The High Court order to this extent stand set aside. The claim of the appellant to the extent of 2/5th share over Schedule A property succeeds. Accordingly, the present appeal is partly allowed. Costs on the parties. G

R.P. Appeal partly allowed.