IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

RSA.No. 686 of 2013 ()

AGAINST THE JUDGMENT AND DECREE IN AS NO.103/2009 of DISTRICT COURT, ALAPPUZHA DATED 15-06-2012

AGAINST THE JUDGMENT AND DECREE IN OS NO.195/2008 of PRINCIPAL MUNSIFF COURT,ALAPPUZHA DATED 30-09-2009

APPELLANT(S)/APPELLANT/PLAINTIFF:

RAMESAN K.V.,
AGED 59 YEARS, S/O. NARAYANI
RESIDING AT MADATHINGAL HOUSE, KOMALAPURAM VILLAGE
THEKKE ARYAD MURI, ALAPPUZHA DISTRICT.

BY ADVS.SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN
SMT.T.J.SEEMA

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

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1. SULOCHANA
W/O. MRITHUNJAN, AGED ABOUT 60
RESIDING AT MALIYACKAL HOUSE, NORTH ARYAD
NETHAJI P.O., ALAPPUZHA - 688 006.

2. PUSHPAVALLY,
W/O. BABU, AGED ABOUT 58, RESIDING AT CHAKKANATTIL
SOUTH ARYAD, AVALOOKUNNU P.O., ALAPPUZHA - 688 006.

3. VISWAMMA,
W/O. SASI, AGED ABOUT 50, RESIDING AT SRV SADANAM
MORTH ARYAD, MANNANCHERY P.O., ALAPPUZHA - 688 006.

4. GIRIJA
W/O. PONNAPPAN, AGED ABOUT 48
RESIDING AT AJANTHA NIVAS, ASRAMAM WARD
AVALOOKUNNU P.O., ALAPPUZHA - 688 006.

R1 TO R4 BY ADV. SRI.K.S.HARIHARAPUTHRAN
R1 TO R4 BY ADV. SRI.GEORGE MATHEW

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 31-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.686 of 2013

Dated this the 31st day of July, 2015

JUDGMENT

Defeated plaintiff in a suit for permanent prohibitory injunction is the appellant. The defendants are the respondents. Parties are hereinafter referred to as the plaintiff and defendants for the sake of convenience.

2. Plaintiff is the brother of defendants. The disputed property originally belonged to deceased Narayani, mother of the plaintiff and the defendants. It is the case of the plaintiff that deceased Narayani executed a Will in his favour on 30.04.2007 and it was registered. Ext.A1 is the Will in dispute. Narayani expired. According to the plaintiff, thereafter the Will came into effect. The plaintiff claims that he is in possession of the property by virtue of the Will. As the defendants tried to trespass into the property, he was left with no other option, but to file the suit.

3. The defendants stiffly resisted the suit by contending that the Will propounded by the plaintiff is a false and fabricated document. Their mother did not subscribe her signature to the document. She was not having testamentary capacity to execute the document set up by the plaintiff. Deceased Narayani was an illiterate lady and she was suffering

from hyper tension, diabetes and abdominal diseases for about fifteen years before her death. She had undergone treatment in Medical College Hospital, Alappuzha. Her left leg was amputated after a prolonged treatment. Deceased Narayani developed loss of memory almost five years prior to her death. She was unable to execute a Will as put forward by the plaintiff. Hence the suit is liable to be dismissed as the property belong to the plaintiff and defendants in co-ownership.

4. The courts below, on elaborate consideration of evidence, found that Ext.A1 Will is not a genuine document. Its execution is not proved. Besides, it is shrouded by suspicious circumstances. Therefore, the relief claimed by the plaintiff was declined. Feeling aggrieved, the plaintiff has preferred this second appeal.

5. Heard the learned counsel for the plaintiff and defendants.

6. The trial court considered oral evidence of four witnesses on the side of the plaintiff and the same number of witnesses on the side of defendants. Similarly Exts.A1 to A4 and B1 to B3 are the documents produced by the respective parties. Ext.X1 is the case records produced on summons from the SAT Hospital, Thiruvananthapuram to show the health condition of deceased Narayani.

7. Courts below found on the basis of oral and documentary evidence that deceased Narayani was having no testamentary capacity at

the time of execution of the alleged Will. Both the courts have discussed the evidence threadbare to arrive at that conclusion. But, both the courts failed to note the first and foremost aspect whether the execution of the Will was proved properly or not. According to me, the first point to be proved in respect of a Will under challenge is its due execution. If only execution of the Will is established, the questions of testamentary capacity and repelling the suspicious circumstances arise for consideration. In my view, the plaintiff has failed to establish the execution of Will as required under Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872. The said provisions are extracted hereunder:

> *"**63.Execution of unprivileged Wills**.-Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-*
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> *(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*
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> *(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*
>
> *(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign*

or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

*"**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 evidence.*

Provided that it shall not be necessary to call an 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, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

8. A reading of Section 63 of the Succession Act will show that the testator should have signed or affixed his mark on the Will first in point

of time. It also could have been signed by some other person, in the presence of the testator and by his direction. Another requirement is that the signature or mark of the testator or the signature of the person signing for him should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will. Next condition is that the Will should be attested by two or more witnesses. It goes without saying that the witnesses must be persons *sui juris*. It is important to note that each of the witness should have seen the testator signing or affixing his mark to the Will or some other person signing the Will in the presence and by the direction of the testator. If not, the witnesses should have received a personal acknowledgement from the testator of his signature or the mark or of the signature of such other person. Yet another requirement is that each of the witness should have signed the Will in the presence of the testator. But, it is clear from the Section that it shall not be necessary that more than one witness be present at the same time. No particular form of attestation is prescribed by the provision. If all the above said formalities are properly established, then the Will stands proved. Section 68 of the Evidence Act requires that at least one attesting witness should be called for the purpose of proving the execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It is beyond any scope of a challenge that the mandate of Section 68 of Evidence Act is

that the Will should be proved to be executed in the manner stated in Section 63 of the Succession Act. Testimony of PWs 4 and 5 have been relied on by the learned counsel for the plaintiff. PW4 is one of the witnesses to Ext.A1 document. Even in chief examination, she failed to testify that she signed on Ext.A1 in the presence of the testatrix. PW5 is the other witness to Ext.A1. He stated that deceased Narayani had signed on Ext.A1. To a leading question, he answered that after Narayani put her signature, PW4 signed and thereafter, he signed.

9. Learned counsel for the plaintiff contended that PW5 has specifically proved the attestation of Ext.A1 Will and there is no infirmity in the matter of proving execution of Ext.A1. This contention has to be appreciated in the light of the binding precedents. The Supreme Court in **Janki Narayan Bhoir v. Narayan Namdeo Kadam (AIR 2003 SC 761)**, in paragraph 10, laid down the following proposition of law:

> *"Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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 an evidence. It flows from this*

Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the Will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want

to prove and establish a Will in a Court of law by examining at least one attesting witness even though Will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of Will at least by two witnesses for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the Will under Section 68 of the Evidence Act fails to prove the due execution of the Will then the other available

attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the Will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

Thereafter, a three Judges Bench of the Apex Court in **Yumnam Ongbi Tampha Ibemma Devi v. Yumnam Joykumar Singh and others ((2009) 4 SCC 780)** held as follows:

"The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested witness should put his signature on the Will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, execution has to be proved in the manner laid down in section and the Evidence Act which requires that atleast one attesting witness has to be examined for the purpose of proving the execution of such a document. Therefore, having regards to the provisions of S.68 of the Evidence Act and S.63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner

provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator."

10. Learned counsel for the plaintiff contended that as PW5 has proved execution of Ext.A1 Will, the fact that PW4 failed to testify in accordance with Section 63 of the Succession Act is not fatal to the acceptability of the Will. I cannot agree with that submission for the reason that Section 68 of the Evidence Act gives a relaxation to propounder of a Will that only one of the attesting witnesses need be examined to prove the execution of Will. The plaintiff having chosen to examine two attesting witnesses, the mandatory requirement of Section 63 of the Succession Act will have to be complied with by both the witnesses. Going by the evidence of PWs 4 and 5, the emerging position is that there is no evidence before the court to hold that both the witnesses signed the Will in the presence of the testator either together or separately. Even if the law does not require the presence of both the witnesses at the same time, the basic fact that they subscribed their signature to the Will in the presence of the testator cannot be dispensed with. In this case, it is the case of the plaintiff that both witnesses put their signature on the Will together. In the absence of

proof of that aspect, the Will cannot be said to be proved.

11. Learned counsel for the respondents relying on **Narinder Singh Rao v. AIR Vice-Marshal Mahinder Singh Rao ((2013) 9 SCC 425)** and **G.Sekar v. Geetha (AIR 2009 SC 2649)** contended that the concurrent findings by both the courts that deceased Narayani was not having testamentary capacity is a question of fact. If that aspect falls within the realm of question of fact, certainly that question cannot be re-agitated in a second appeal. The observation by the Supreme Court in **Narinder Singh Rao**'s case is that mental capacity of a testator to execute a Will is a question of fact, which cannot be looked into as the issues are pertaining to facts. Almost the same view was taken by the Supreme Court in **G.Sekar**'s case.

12. Learned counsel for the defendants placed reliance on **Ammini Amma v. Govindan Nair (2003 (2) KLT SN.101, Case No.131)** to make the following submissions:

> *"Since the plaintiff disputes the genuineness of Ext.B4, the burden is on the defendant to substantiate the same. Merely because the will is a registered one that itself is not sufficient to remove the suspicion. One of the suspicious circumstances may be with regard to the attestation of the will. In order to prove that a will was properly executed and was intended to*

be given effect to as such, it has to be proved, apart from other things, that the said document was attested by two or more witnesses in the manner provided under S.63(c) of the Indian Succession Act. It is not necessary that both the attesting witnesses should be present at the same time, but the witnesses should say that he has signed the will in the presence of the testator or after obtaining an acknowledgement from the testator. S.68 of the Evidence Act mandates that a document, which requires by law, to be attested shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution."

13. Therefore, the courts below on the basis of documentary and oral evidence found that deceased Narayani due to old age and ill-health could not have been in a position of understanding the consequences of executing any document. Further, it is also found that the propounder of the Will (beneficiary of the Will) had taken active participation in the matter of execution of Will. Not only the propounder, his wife was also involved in the process of execution. That apart, question of unnatural legacy was also considered. All these aspects in the evidence led the courts below to arrive at a conclusion that the Will, if at all proved to have been executed, is shrouded with suspicious circumstances. This being a question of fact

cannot be re-agitated here.

14. Learned counsel for the plaintiff relying on Section 58 of the Registration Act contended that registration of the Will adds credibility to its genuineness. In the absence of proving execution of the Will and dispelling the suspicious circumstances, merely by registration no sanctity can be attached to the Will.

Considering the entire facts and circumstances, I am of the view that the courts below correctly analysed the facts and came to the conclusion that execution of the Will has not been proved and the testamentary capacity of deceased Narayani was not properly established. There is no infirmity in these findings. I find no substantial question of law arising for consideration. I find no merit in the appeal. Therefore, the appeal is dismissed.

All pending interlocutory applications will stand closed.

A. HARIPRASAD, JUDGE.

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