2025:KER:29770

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

TUESDAY, THE 8TH DAY OF APRIL 2025 / 18TH CHAITHRA, 1947

RSA NO. 504 OF 2012

AGAINST THE JUDGMENT&DECREE DATED 13.12.2011 IN AS NO.45 OF 2008 OF ADDITIONAL DISTRICT COURT, MAVELIKKARA ARISING OUT OF THE JUDGMENT&DECREE DATED 05.12.2007 IN OS NO.428 OF 2004 OF MUNSIFF COURT, MAVELIKKARA

APPELLANT/APPELLANT/PLAINTIFF:

R. SASIKUMAR
AGED ABOUT 47 YEARS, S.O. RAMAKRISHNAN, JEEVAN NIVAS, VETTIYAR MURI, VETTIYAR VILLAGE-FROM KALLIMEL MURI, VETTIYAR VILLAGE, MAVELIKKARA TALUK.

BY ADVS.
SRI.K.JAJU BABU
SMT.DHANYA CHANDRAN
SMT.M.U.VIJAYALAKSHMI

RESPONDENT/APPELLANT/DEFENDANT:

K. SAVITHRI
AGED 68 YEARS, W/O. LATE RAGHAVAN, KRIPASADANAM, VETTIYAR MURI, VETTIYAR VILLAGE, MAVELIKKARA TALUK, PIN-690101.

BY ADV SRI.K.SASIKUMAR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2025:KER:29770

JUDGMENT

1. The appellant is the plaintiff in the suit. The suit was for declaration, recovery of possession and consequential injunction with respect to the plaint schedule property. The plaint schedule property is 4.30 Ares and the residential building therein originally belonged to one Raghavan.
2. Plaintiff is the brother's son of the said Raghavan. Defendant is the legally wedded wife of the said Raghavan. Raghavan and the defendant do not have any children. Raghavan died on 06.11.2004. The plaintiff claimed title over the plaint schedule property on the strength of Ext.A1 registered Will dated 04.12.2000 allegedly executed by Raghavan bequeathing the plaint schedule property in favour of the plaintiff.
3. Plaint allegations are that, as per the recitals in Ext.A1 Will, the defendant has got every right to reside along with the plaintiff in the plaint schedule property, the plaintiff has to maintain her as

his mother; if the defendant intends to leave the residence with the plaintiff, the plaintiff has to pay Rs.50,000/- to the defendant; and an amount of Rs.20,000/- is to be given to one Sujatha who is the daughter of the brother of the defendant within three years from the date of death of Raghavan. When the defendant got knowledge about the Will after the death of Raghavan, the defendant tried to obstruct the plaintiff from enjoying the plaint schedule property and building therein and tried to make arrangements for the disposal of the property. The plaintiff is ready and willing to maintain the defendant as intended by Raghavan in Ext.A1 Will. Hence, the plaintiff prayed for a declaration of title and possession over the plaint schedule property, a permanent prohibitory injunction restraining the defendant from creating any encumbrance over the plaint schedule property and from alienating the property, and to recover possession of the plaint schedule property.

4. The defendant opposed the suit prayers by filing Written

Statement contending, *inter alia*, that on the death of Raghavan the plaint schedule property devolved upon the defendant as the sole legal heir. The defendant renovated the residential building therein with the money obtained under Indira Awas Yojana Scheme and with the money obtained from her siblings. The building was constructed with the consent of Raghavan. Raghavan was not having any right in the building. Raghavan was sick and was not having sound mental capacity to execute the Will. Raghavan has not executed any Will. The signatures in Ext.A1 is not that of Raghavan. Raghavan was unable to understand the contents of the Will. For the last 15 years, the plaintiff was in enemical terms with Raghavan. The Will is not attested by two attesting witnesses. Even if it is found that Raghavan has executed the Will, it is an invalid document as there are no sufficient attestors for the same.

5. On the side of the plaintiff, the plaintiff was examined as PW1, the Doctor who treated Raghavan was examined as PW2, the

Secretary of the Panchayat was examined as PW3, and the Scribe of Ext.A1 was examined as PW4. Exts.A1 to A5 were marked from the side of the plaintiff. On the side of the defendants, the Block Development officer was examined as DW1 and the defendant was examined as DW2. Exts.B1 to B3 were marked.

6. The Trial Court found that Raghavan executed Ext.A1 Will with sufficient mental capacity, that Ext.A1 Will is attested by two attesting witnesses, including PW4 Scribe, and that PW4 Scribe signed Ext.A1 in the capacity as witness also. The suit was decreed declaring the title of the plaintiff over the plaint schedule property and the building therein as per Ext.A1, granting permanent prohibitory injunction restraining the defendant from creating any encumbrance and from alienating the plaint schedule property and allowing the recovery of possession of the plaint schedule property on the strength of A1 Will permitting the plaintiff to discharge his duties as per Ext.A1 Will.

7. The defendant filed Appeal before the First Appellate Court, and the First Appellate court allowed the Appeal setting aside the judgment and decree of the Trial court and dismissing the suit. The First Appellate Court found that Ext.A1 Will is neither properly executed nor properly attested; that developments after the year 2000 would go to show the doubtful circumstances encompassed in the will; that the plaintiff could not remove the suspicious circumstances surrounding the execution of Ext.A1 Will; that the evidence of PW4 is not sufficient either to prove the signature or to prove Ext.A1 Will beyond the shadow of suspicious circumstances and that PW4 is not an attesting witness to Ext.A1 Will.

8. This Court admitted the Regular Second Appeal on the following substantial questions of law.

i. Viewed in the context of Sec.63 of the Indian Succession Act and Sec.68 of the Evidence Act, whether the first appellate court is justified in its finding that Ext.A1, Will is neither properly executed or properly

attested, when all the mandatory requisites have been sufficiently met by the plaintiff to seek his right, title and right of possession over the plaint schedule property?

ii. Whether the first appellate court ought to have found that the appellant/plaintiff, as propounder of the Will, had discharged his onus of establishing that Ext.A1, Will was free from suspicious circumstances when he had proved the legally mandated elements such as signature of the testator, his sound state of mind and the presence of two attesting witnesses at the time of execution of the Will?

iii. Whether the first appellate court is right in relying on the subsequent events after the execution of the Will for deciding its validity?

9. I heard the learned Senior counsel for the appellant Sri.K.Jaju Babu instructed by Adv.Sri.Sachin Ramesh and the learned Counsel for the respondent Sri.K Sasikumar.

10. The learned Senior Counsel for the appellant contended that the First Appellate Court ought not to have interfered with the well

considered judgment of the Trial Court. The First Appellate Court misconstrued and misunderstood the evidence of PW4 who is one of the attesting witnesses of Ext.A1. PW4 though was a Scribe of Ext.A1 Will specifically stated that he had signed the Will as a witness also. There is no legal bar for standing the scribe as attesting witness. The plaintiff has removed all the suspicious circumstances surrounding Ext.A1 Will and hence the First Appellate Court ought to have dismissed the Appeal confirming the judgment and decree of the Trial Court. The learned Senior Counsel cited the decision of this Court in **Ajay P.Asher v. Kirit P.Asher and another [2011(3) KHC 288]** to substantiate the point that total exclusion of an heir apparent from the estate of the testator is not ground to doubt the genuineness of the Will and that the testator may act foolishly even heartlessly and in such case Court shall not interfere with exercise of his volition if he acts in full comprehension of what he is doing. Senior Counsel cited the decision of the Hon'ble Supreme Court

in **Gopal Krishan v. Daulat Ram [2025 KHC 6009]** to substantiate the point that there is no statutory requirement under Section 63(c) of the Indian Succession Act that the attestor should sign the Will as per the direction of the Will. Learned Senior Counsel concluded by submitting that the Appeal is liable to be allowed answering the substantial questions of law in favour of the appellant.

11. On the other hand, the learned Counsel for the respondent contended that the Trial Court approached the matter in a casual manner. The pleadings and evidence were not appreciated in the right perspective. The First Appellate Court considered the matter extensively with reference to authoritative pronouncements and arrived at the right conclusion. PW4 who is shown as Scribe of Ext.A1 specifically admitted that he did not sign the Will in the capacity as witness. There is no evidence that the alleged attesting witnesses attested as per the direction of the testator. Section 63(c) of the Indian Succession Act

mandates that the attesting witnesses shall sign as per the direction of the testator. Learned Counsel cited the decision of the Hon'ble Supreme Court in **Chinu Rani Ghosh v Subhash Ghosh [2025 KHC online 7044]** to substantiate the point that the object and purpose by which a Will is attested by a witness is quite distinct from the object and purpose by which a scribe would attest a Will; that an attesting witness would attest a Will on the request made by the testator for the purpose of due execution of the Will and in accordance with S.63 of the Succession Act and that the object and purpose with which a scribe or for that matter, a draftsman of the will would attest the Will is not the same. Learned Counsel concluded by submitting that the Appeal is liable to be dismissed as the formulated substantial questions of law do not arise in the matter.

12. I have considered the rival contentions.

13. In **Chinu Rani Ghosh(supra)** cited by the counsel for the respondent the question whether the attesting witnesses are to

be signed as per the direction of the testator was not specifically before the Honorable Supreme Court and it was not considered by the Hon'ble Supreme Court. But in **Gopal Krishan (supra)** cited by the Senior Counsel for the appellant, the Hon'ble Supreme court specifically considered the said question and held that the part of the Section 63(c) employs the term direction would come into play only when attestor to the Will would have to see some other person signing the Will. Hence the contention of counsel for the respondent that Section 63(c) of the Indian Succession Act mandates that the attesting witnesses shall sign as per the direction of the testator is unsustainable.

14. The First Appellate Court has referred various judicial pronouncements and arrived at the conclusion that scribe can become an attesting witness if his evidence is to the effect that he signed the document as an attesting witness also. Of course, there could not be any quarrel on the said proposition of law. What is relevant is whether the Scribe was having *animus*

attestandi while signing the document and whether the said fact is proved in his evidence.

15. The onus of proving the Will is always on the propounder who needs to prove testamentary capacity of the testator, signature of the testator and attestation by two witnesses in the absence of suspicious circumstances. When there are suspicious circumstances, in addition to the above proof, the propounder has to explain and remove the suspicion to the satisfaction of the Court.

16. PW4 is cited as the second attesting witness in Ext.A1. The evidence of PW4 is not precise and definite regarding attestation. At one point, he deposed that he signed as witness. But when he was specifically asked whether he signed as witness, he answered in the negative. Later, he said he signed in triple capacities. When the stand of PW4 was not definite and was wavering, it could be said that he was an attesting witness to the document. First of all, PW4 should himself be sure as to

his capacity, then only he will be in position to convince his capacity to others.

17. The first Witness in Ext.A1 - Chellamma Meenakshi is also a scribe in the office of PW4. Though it is sufficient to examine one of the two attesting witnesses to prove the execution of the document under Section 68 of the Evidence Act, such witness has to give the evidence of attestation of the other witness also. If the examined witness is unable to give evidence of attestation of the other witness, the other witness has to be examined to his attestation to the document. This Court in **Mannarakkal Madhavi (died) v. Nankanadath Pulparambil Devidasan (died) [2024 KHC 781]** has reiterated the above proposition of law by holding that that if one attesting witnesses can prove the execution of Will in terms of S.63(c), namely, attestation by two attesting witnesses in the manner contemplated therein, examination of the other witness can be dispensed with; that Section 63(c) nowhere says both attesting witnesses must be

present at the same time or that they must sign simultaneously or that they must also speak the attestation by other witness; that when one attesting witness is unable to speak of the attestation by the other witness the propounder can examine the other attesting witness to satisfy the mandatory requirement under the said section. When PW4 was examined he could not give any definite answer with respect to the attestation of the other witness also. When PW4 was asked whether the other witness had signed as Scribe, initially he answered in the affirmative and later in negative. The evidence of PW4 is doubtful whether Chellamma Meenakshi had *animus attestandi* at the time of signing the document. In such case, the propounder ought to have examined Chellamma Meenakshi to prove her attestation to the document. In the absence of the evidence of Chellamma Meenakshi, it could not be held that the execution of Ext.A1 Will is proved. The conclusion is that the evidence of PW4 is not sufficient to prove his attestation and the

attestation of Chellamma Meenakshi to Ext.A1. The First Appellate Court is perfectly justified in holding that the evidence of PW4 is not sufficient to prove the execution of Ext.A1.

18. The First Appellate Court found that there is suspicion surrounding the execution of Ext.A1 Will since the testator has bequeathed the property in favour of his nephew/plaintiff avoiding his poor widow leaving her at the mercy of the plaintiff. Admittedly, the plaint schedule property is the only property which belonged to the testator. It is the residential property in which the testator along with the defendant had been living. After the death of the testator, the defendant has been continuing her residence there. The original house in the property was renovated after obtaining assistance under IAY Scheme. It is in evidence that the application for the financial assistance was made by the testator and the same was received by the defendant and she renovated the residential building. The defendant has a case that financial assistance

from her siblings were also used for renovating the building. The plaintiff does not have a case that there was any kind of difference of opinion or quarrel between the testator and the defendant. The defendant was not having any job or income. The defendant was fully depending on the testator for livelihood. The testator had not made any provision for the maintenance of the defendant. Plaintiff could not show any special reason for the testator for bequeathing his only property in which the testator and the defendant had been residing, to the plaintiff. In **Ajay P.Asher (supra)** this Court held that total exclusion of a heir apparent from the estate of the testator is not ground to doubt the genuineness of the Will. But in that case also it is found that the excluded son was having bitter litigation with the testator. Every case has got its own unique facts and circumstances. Total exclusion of an heir apparent from the estate of the testator by itself is not ground to doubt the genuineness of the Will. But in the facts and circumstances of

the present case, it is a suspicious circumstance which should have been explained by the plaintiff. The learned Senior Counsel for the appellant contended that the testator wanted to see that the property does not go in the hands of the defendant after her death and hence Ext.A1 Will is executed in favour of the plaintiff who is the brother's son of the testator. In such case also, there is no evidence as to why the plaintiff was chosen by the testator from among his relatives. As rightly pointed out by the counsel for the respondent that as per Section 15 of the Hindu Succession Act, the property will go to the heirs of her husband, since the defendant is not having any children. Hence such an explanation from the plaintiff is also not acceptable. It is hard to believe that the testator would leave his poor aged widow having no job or income at the mercy of his nephew bequeathing the entire property to him. The First Appellate Court is right in holding that the plaintiff failed to remove the suspicion surrounding the execution of Ext.A1 Will.

19. The testator died on 06.11.2004. The plaintiff filed the suit against the defendant on 01.12.2004 within one month from the death of testator. Even as per the disputed Will, the defendant is having right of residence. But the plaintiff even sought for recovery of possession of the property from the defendant and the same was readily granted by the Trial Court while decreeing the suit in favour of the plaintiff. The First Appellate Court is fully justified in interfering with the judgment and decree passed by the Trial Court.

20. The substantial questions of law Nos.i & iii are answered in the affirmative and substantial questions of law No.ii is answered in the negative, all against the appellant.

21. The Regular Second Appeal is dismissed with costs.

sd/-

M.A.ABDUL HAKHIM

JUDGE

Jma/shg