

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

FAO (RO).No. 226 of 2015

**AS 154/2014 OF IIND ADDL.DISTRICT COURT, KOZHIKODE, DATED 30-07-2015
OS 10/2009 OF SUB COURT, QUILANDY, DATED 03-07-2014**

APPELLANT(S)/10TH RESPONDENT/PLAINTIFF:

**SREEJAN, AGED 48 YEARS, S/O.SEKHARAN,
SWASTHAM, RESIDING AT VALIYAPURAYIL,
NEAR AMBADI TALKIES, EAST ROAD, KOYILANDY,
PANTHALAYANI AMSOM, KOTHAMANGALAM DESOM,
KOYILANDY TALUK, KOZHIKODE DISTRICT.**

BY ADV. SRI.M.G.ASHOKAN

**RESPONDENT(S)/APPELLANT & RESPONDENTS 1 TO 6,8 AND 9/DEFENDANTS 1 TO
7,9 & 10:**

- 1. P. RAMAKRISHNAN, S/O.KUTTY, AGED 58 YEARS,
GOVERNMENT SERVICE, VADAKKE VENNOTTU KUNIYIL HOUSE,
MANAMAL, ANELA ROAD, KOYILANDY P.O.,
PANTHALAYANI AMSOM, KOTHAMANGALAM,
DESOM, KOYILANDY TALUK.**
- 2. BALAKRISHNAN K., S/O.MADHAVI,
AGED 66 YEARS, PENSIONER, SMRUTHI, PANTHALAYANI,
PANTHALAYANI AMSOM, DESOM, KOYILANDY TALUK.**
- 3. YESODHA.P, W/O.LATE MADHAVAN O.P.,
AGED 70 YEARS, SWASTHAM, ATTAVAYALKUNI,
CHAITHANYA, KOLLAM P.O., VIYYUR AMSOM,
KOLLAM DESOM, KOYILANDY TALUK.**
- 4. JANU.P., W/O.CHERIYAKKAN, AGED 67 YEARS,
SWASTHAM, 'CHITHRA', MANNDAMANGALAM,
MOODADI P.O., VIYYUR AMSOM, MANDAMANGALAM DESOM,
KOYILANDY TALUK.**

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5. RADHA P., W/O. LATE BALAN.M, AGED 56 YEARS, SWASTHAM, 'NANDANAM', MANAMAL VEEDU, MANAMAL, KOYILANDY P.O., PANTHALAYANI AMSOM, KOTHAMANGALAM, DESOM, KOYILANDY TALUK.
6. VILASINI.P.O., W/O.GANGADHARAN.K., AGED 54 YEARS, SWASTHAM, AISWARYA, CHERUVAYALKUNI, EDAKKULAM P.O, CHENGOTTUKAVU AMSOM, EDAKKULAM DESOM, KOYILANDY TALUK.
7. SUJATHA.K.M., C/O.LEVAN, AGED 52 YEARS, SWASTHAM, VALAYAMPARAMBIL, AASRAMAKOLLY, AMARAKUNI P.O., PULPPALLI, PADICHIRA AMSOM, AASRAMAKOLLI DESOM, WAYANAD DISTRICT.
8. SEKHARAN, AGED 75 YEARS, SWASTHAM, VAYALPURAYIL, EAST ROAD, KOYILANDY, PANTHALAYANI AMSOM, KOTHAMANGALAM DESOM, KOYILANDY TALUK.
9. JAYASREE (MENTALLY RETARDED), AGED 51 YEARS, SWASTHAM, VAYAL PURAYIL, EAST ROAD, KOYILANDY, PANTHALAYNI AMSOM, KOTHAMANGALAM DESOM, KOYILANDY TALUK, REP.BY LEGAL GUARDIAN R8 SEKHARAN.

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR ADMISSION ON 30-10-2015, ALONG WITH FAO(R.O) 227/2015 & FAO (R.O.)228/2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PJ

P.B.SURESH KUMAR, J.

F.A.O.(R.O)Nos. 226, 227 & 228 of 2015

Dated this the 30th day of October, 2015

JUDGMENT

These appeals are preferred challenging the common judgment in A.S.Nos.154, 155 and 156 of 2014 on the file of the District Court, Kozhikode.

2. A.S.No.154 of 2014 is preferred challenging the decree and judgment in O.S.No.10 of 2009 and A.S.No.155 of 2014 is preferred challenging the decree and judgment in O.S.No.151 of 2010. Likewise, A.S.No.156 of 2014 is preferred challenging the decree and judgment in O.S.No.150 of 2010. The said suits were tried jointly treating O.S.No.10 of 2009 as the lead case. The appellant is the plaintiff in O.S.No.10 of 2009 which was one for

partition. The suit property belonged to one Kutty. The suit was resisted by defendants 1 and 4 contending that Kutty had bequeathed the suit property to them as per Ext.B1 will. O.S.No.150 of 2010 was one filed by the fourth defendant and another against the plaintiffs seeking a decree of injunction in respect of the suit property on the strength of Ext.B1 will and O.S.No.151 of 2010 was one filed by the fourth defendant against the first defendant seeking partition of the suit property among them.

3. The trial court did not accept the contention of defendants 1 and 4, for, Ext.B1 will has not been proved by them in accordance with Section 69 of the Evidence Act. Consequently, the trial court decreed O.S.No.10 of 2009 and dismissed O.S.Nos.150 of 2010 and 151 of 2010. The fourth defendant challenged the decision of the trial court in the three appeals referred to above. In the appeals, the appellate court also found that defendants 1 and 4 have not

proved the execution of Ext.B1 will. Nevertheless, the appellate court allowed the appeals and remitted the suits for fresh disposal, after affording defendants 1 and 4 an opportunity to prove the execution of Ext.B1 will. Aggrieved by the said decision of the appellate court, the appellant who is the plaintiff in O.S.No.10 of 2009 has come up in these appeals.

4. Heard the learned counsel for the appellant.

5. The learned counsel for the appellant contended that the power of the appellate court to remand a suit which is disposed of otherwise than on a preliminary issue can be exercised only if the conditions provided for in Rule 23A of Order XLI of the Code of Civil Procedure are satisfied. According to the learned counsel, there is no finding by the appellate court that the judgment of the trial court is liable to be reversed and that a retrial is necessary for the disposal of the suits, and therefore, the appellate court has

acted without jurisdiction in remitting the suits for fresh disposal. It was pointed out by the learned counsel for the appellant that the suits are remitted for fresh disposal solely for the purpose of enabling the fourth defendant to prove the execution of Ext.B1 will which is impermissible in law. He relied on the decision of this court in **Sundaram Hammond v. K.Padmanabhan and Others** [2015 (2) KHC 802] in support of the said contention.

6. There is force in the contention raised by the learned counsel for the appellant. However, I am unable to accept the said contention, for, I find that the order of remand made by the appellate court is justified on another ground. Rule 23 of Order XLI of the Code of Civil Procedure as amended by the Kerala High Court provides that where the appellate court in setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, the appellate court may, by order, remand the

case. In the instant case, the will relied on by defendants 1 and 4 is a registered will executed in the year 1982. The appellate court found that the signatures and thumb impressions contained therein are the signatures and thumb impressions of the testator. The appellate court also found that there are no suspicious circumstances surrounding the execution of the will. The only impediment found by the appellate court in relying on Ext.B1 will was that the execution of the said document has not been proved by the propounders as provided for under Section 69 of the Evidence Act. It is in the said circumstances, the appellate court thought it fit to give to the fourth defendant an opportunity to prove the execution of the will. The appellate court, according to me, has ample power under Rule 23 of order XLI of the Code of Civil Procedure to remand such a case for fresh disposal. The decision in **Sundaram Hammond v. K.Padmanabhan and Others** (*Supra*) is a

decision dealing with the scope of Rule 23A of Order XLI of the Code of Civil Procedure. The scope of the power of the appellate court to order remand under Rule 23 of Order XLI of the Code of Civil Procedure, in the interest of justice, has not been dealt with in the said case.

The appeals, in the circumstances, are devoid of merits and the same are, accordingly, dismissed. All the interlocutory applications in the appeals are closed.

P.B.SURESH KUMAR, JUDGE.

smm