

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 18TH DAY OF FEBRUARY 2015/29TH MAGHA, 1936

FAO (RO).No. 216 of 2014 ()

AGAINST THE ORDER IN AS 75/2011 of ADDL.D.C., NORTH PARAVUR,
DATED 20.3.2014.

AGAINST THE JUDGMENT IN OS 392/2008 of MUNSIF COURT,
NORTH PARAVUR, DATED 03.11.2010.

APPELLANT/RESPONDENT/DEFENDANT:-

BHANUMATHY
W/O RAVEENDRAN, VELANPARAMBIL, POTTA KARA
THRIIPPUNITHURA, NADAMA VILLAGE, KANAYANNUR TALUK

BY ADVS.SRI.N.NEELAKANDHAN NAMBOODIRI
SRI.P.S.NARAYANA RAJA

RESPONDENT/APPELLANT/PLAINTIFF:-

RAJAPPAN, AGED 77 YEARS
S/O PADMANABHAN, MADATHUMNPADIKKAL, KOTTUVALLY DESOM
KOTTUVALLY VILLAGE, PARAVUR TALUK

BY ADV. SRI.P.RADHAKRISHNAN (1)
BY ADV. SRI.MADHU RADHAKRISHNAN

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING
BEEN FINALLY HEARD ON 18-02-2015, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

Kvs/-

P.B.SURESH KUMAR, J.

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F.A.O.(R.O.) No.216 of 2014.
= = = = =

Dated this the 18th day of February, 2015.

J U D G M E N T

The decision in A.S.No.75 of 2011 on the file of the Court of the Additional District Judge, North Paravur by which the suit O.S.No.392 of 2008 on the file of the Court of the Munsiff, North Paravur was remanded for fresh disposal, is under challenge in this appeal. The defendant in the suit is the appellant.

2. O.S.No.392 of 2008 is a suit for declaration and mandatory injunction. The defendant in the suit is the sister of the plaintiff. The case of the plaintiff is that their father had executed Ext.A1 Will by which the plaint schedule property was bequeathed to him on condition that he should pay to the defendant a sum of Rs.3,500/- and that though the Will had taken effect on the death of the testator on 23.10.1990, the defendant is not accepting the amount directed to be paid to her as per the terms of the Will. The plaintiff has therefore, claimed a decree of mandatory injunction directing the defendant to

execute a receipt accepting the amount due to her as per the terms of the Will and for a declaration that the plaint schedule property is free from encumbrance.

3. The defendant filed written statement contending *inter-alia* that Ext.A1 Will is not genuine and that the same has not been properly attested as required by law.

4. The following were the issues formulated for trial:

1. Whether the plaintiff is entitled to get a permanent prohibitory injunction as prayed for?
2. Whether the plaintiff is entitled to get a declaration as prayed for?
3. Reliefs and cost?

5. The plaintiff has examined on his side Pws.3 and 4 who were the attesting witnesses to Ext.A1 Will. The trial court found that PW4 who is the scribe of the Will cannot be treated as the attestor to Ext.A1 Will and consequently dismissed the suit, holding that there being only one attestor to Ext.A1 Will, the same cannot be treated as a Will attested in the manner provided for under Section 63 of the Indian Succession Act.

6. The plaintiff challenged the decision of the trial court in appeal. The appellate court found that Ext.A1 Will has been attested in accordance with Section 63 of the Indian Succession

Act and that merely because PW4 is the scribe of the document also, it cannot be said that he is not an attesting witness to the document. In the matter of holding so, the appellate court relied on the evidence tendered by PW4 that the testator has signed Ext.A1 Will before him and thereafter he has attested the signature of the testator in his presence. Consequent on the said finding, the appellate court remitted the suit for fresh disposal, holding that proper issues including the issue as to whether the plaintiff is entitled to the mandatory injunction sought for in the suit have not been framed or decided by the trial court. It is aggrieved by the said decision of the appellate court that the defendant has come up in this appeal.

7. Head the learned counsel for the appellant and the learned counsel for the respondent.

8. The learned counsel for the appellant contended that the finding of the lower appellate court that PW4 can be considered as an attesting witness to the Will is unsustainable. According to the learned counsel, it is recited in Ext.A1 that PW4 is the scribe of Ext.A1 Will and therefore he cannot be considered as an attesting witness to the said Will. The copy of the evidence tendered by PW4 as also the copy of Ext.A1 Will were made available to me. The copy of Ext.A1 Will indicates beyond

doubt that there are two witnesses to Ext.A1 Will. Witness No.1 is PW3 and witness No.2 is PW4. True, in the description of witness No.2, it is also stated that he is the scribe of the document as well. The name of PW4 is not entered in the document merely as the scribe. Instead, the name of PW4 is entered in the document as a witness to the document. It is thus evident that PW4 is also an attesting witness to the document. There is no inhibition in the scribe attesting the will. The learned counsel for the appellant, relying on the decision of the Apex Court in **N.Kamalam v. Ayyasamy** (2001(7) SCC 503), contended that the presence of scribe and his signature appearing in the document cannot be taken to be the proof of due attestation of the document. The portion of the said decision of the Apex Court which is relied on by the learned counsel for the appellant reads thus:

"26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses:

The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial

conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself—this is again, however, not the situation existing presently in the matter under consideration.”

True, the Apex Court has held that the presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation. However, it was clarified by the Apex Court in the said judgment that a scribe can also be an attesting witness, if that situation is so expressed in the document itself. In the instant case, it is evident from the recitals of Ext.A1 Will that PW4 is not merely a scribe to the document, but he is also an attesting witness to the document. As noticed above, PW4 is described in the document as witness No.2. The impugned decision of the appellate court, in the circumstance, is perfectly in order. This appeal is accordingly, dismissed. The parties are directed to appear before the court below on 16.3.2015.

Sd/-
P.B.SURESH KUMAR,
(Judge)

Kvs/-

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PA TO JUDGE.