

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR**

**THURSDAY, THE 4TH DAY OF JUNE 2015/14TH JYAISHTA, 1937**

**MFA.No. 103 of 2013 ()**

**OS 2/2007 of ADDL. SESSIONS COURT (SPL. COURT), KOTTAYAM**

**APPELLANT/PLAINTIFF :**

**SARASAMMA, AGED 61 YEARS, W/O.BHASKARAN,  
NARIPPARAKUNNEL HOUSE, VAZHOOR VILLAGE,  
VAZHOOR KARA, CHANGANACHERRY TALUK.**

**BY ADVS.SRI.V.B.PREMACHANDRAN  
SRI.K.N.GOVINDANKUTTY MENON  
SRI.S.MADHAVAN NAIR**

**RESPONDENTS :**

- 1. KALYANI, AGED 80 YEARS,  
W/O.LAGTE SANKUNNI ACHARI,  
NARIPPARAKKUNNEL HOUSE,  
VAZHOOR VILLAGE, VAZHOOR KARA  
CHANGANACHERRY TALUK 686 504**
- 2. PRASANNAKUMARI, AGED 42 YEARS,W/O.MOHANAN,  
NARIPPARAKKUNNEL HOUSE , VAZHOOR VILLAGE  
VAZHOOR KARA, CHANGANACHERRY TALUK 686 504**
- 3. SANTHAKUMARI, AGED 54 YEARS,  
W/O.SIVARAMAN, NARIPPARAKKUNNEL HOUSE,  
VAZHOOR VILLAGE, VAZHOOR KARA,  
CHANGANACHERRY TALUK 686 504**

**R1 & R2 BY ADV. SRI.M.J.THOMAS**

**THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD  
ON 04-06-2015, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:**

**bp**

**P.B.SURESH KUMAR, J.**

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**M.F.A.No.103 of 2013**  
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**Dated this the 4<sup>th</sup> day of June , 2015**

**JUDGMENT**

The first plaintiff in a contentious proceedings for Letters of Administration is the appellant in this appeal.

2. The plaintiffs and defendants are the children of one Sankunni Achari who died on 14.11.2004. The plaintiffs instituted O.P(CA) 58 of 2006 seeking Letters of Administration in respect of a will executed by Sankunni Achari on 9.11.1999. Defendants 1 and 2 entered appearance in the proceedings and filed objections against the grant of Letters of Administration sought by the plaintiffs. According to the defendants, Sankunni Achari revoked the will dated 9.11.1999 and executed a fresh will on 3.1.2004. They also claimed by way of a counter claim Letters of Administration in respect of the will claimed to have been executed by Sankunni Achari on 3.1.2004. An objection was filed by the

plaintiffs to the counter claim, contending that Sankunni Achari had not executed a will on 3.1.2004. In the light of the objections filed by the defendants, the proceedings became contentious and was registered and decided as a suit.

3. The evidence in the case consists of the oral testimony of PW1 and Ext.A1 on the side of the plaintiffs and the oral testimonies of Dws1 to 4 and Exts.B1 to B4 on the side of the defendants.

4. As the plaintiffs were not in possession of the will dated 9.11.1999, they caused production of a copy of the same from the concerned Sub Registry. Ext.A1 is the copy of the will dated 9.11.1999. Ext.B1 produced by the defendants is the will claimed to have been executed by Sankunni Achari on 3.1.2004.

5. As far as the first will executed by Sankunni Achari is concerned, the trial court found that the same is not a will executed in compliance with the provisions contained in Section 63 of the Indian Succession Act ('the Act' for short).

According to the trial court, there is only one attesting witness to Ext.A1 will. The trial court also found that the plaintiffs have not proved Ext.A1 will by examining the said attesting witness. Coming to the second will, the trial court found that the same is a will executed in compliance with Section 63 of the Act and that the same has been proved by examining both the attesting witnesses. In the light of the said findings, the trial court dismissed the suit and decreed the counter claim granting the defendants the Letters of Administration sought by them. The first plaintiff is aggrieved by the said decision of the trial court.

6. Heard the learned Counsel for the appellant and the learned counsel for respondent Nos. 1 and 2.

7. The learned counsel for the appellant contended that Ext.A1 is a registered will and its execution was not disputed by defendants and therefore, the finding of the court below that Ext.A1 will has not been proved cannot be sustained. He also contended that Ext.B1 will is vitiated by suspicious circumstances and the defendants have not

removed the suspicious circumstances surrounding the execution of the will.

8. I have perused the copy of the will marked as Ext.A1. It is seen that there are two attesting witnesses to the said document. One of the attesting witnesses is one V.G. Prasad and the other is one M.N. Gopalakrishna Pillai. The second attesting witness to Ext.A1 M.N Gopalakrishna Pillai is a scribe of the said document as well. Merely for the reason that M.N.Gopalakrishna Pillai happened to be the scribe of the document, it cannot be said that he is not an attesting witness. There is no impediment in law, in the scribe of a will attesting the same. As such, the view of the trial court that Ext.A1 is not a will executed in compliance with Section 63 of the Act cannot be accepted.

9. On the question as to the proof of Ext.A1 will, I am in agreement with the view taken by the court below. Sections 68 and 69 of the Evidence Act read as follows:

“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.

69. Proof where no attesting witness found – If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

The provisions contained in Section 68 prohibits the use of a document required by law to be attested 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. Section 69 of the Evidence Act provides that if no attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that

person. In the light of the provisions contained in Sections 68 and 69 of the Evidence Act, it is now settled that unless the provisions contained in Sections 68 and 69 of the Act are not complied with, a document required by law to be attested cannot be used as an evidence in a proceedings. It is beyond dispute that will is a document required by law to be attested. Even though there are two attesting witnesses to Ext.A1 document, none of them was called and examined by the plaintiffs. True, the plaintiffs have a case that both the attesting witnesses to Ext.A1 documents are no more. If the attesting witnesses were not alive, the plaintiffs should have taken recourse to the provisions contained in Section 69 of the Evidence Act to prove the execution of the will. Admittedly, the plaintiffs have not adopted the said course. As such, the court below cannot be found fault with for having rendered a finding that Ext.A1 will has not been proved by the plaintiffs.

10. Coming to the second will executed by Sankunni Achari, as noticed above, the defendants have examined

both the attesting witnesses as Dws 1 and 2 respectively. They have also examined the scribe of that document as DW4 in the proceedings. Though DWs 1, 2 and 4 were cross examined thoroughly by the learned counsel for plaintiffs, nothing was brought out from their evidence to discredit their version. The learned counsel for the appellant pointed out that the second will is a verbatim reproduction of the first will except to the extent that it deprives the first plaintiff a share in the property of the testator. He also pointed out that the second will which is substantially in favour of the second defendant who was residing with the testator at the time of his death can only be a document created at the instance of the second defendant. He further pointed out that the attestors to the second will are neighbours of the second defendant. According to the learned counsel, the said circumstances are to be treated as suspicious circumstances vitiating due execution of the will. The question whether the due execution of a will is vitiated due to any suspicious circumstances surrounding its

execution is to be decided on the facts of each case. As far as the present case is concerned, there is nothing on record to indicate that the circumstances as pointed out by the learned counsel for the appellant would vitiate the due execution of the will.

In the aforesaid circumstances, I do not find any merit in the appeal and the same is accordingly dismissed. All the interlocutory applications in the appeal are closed.

**P.B.SURESH KUMAR, JUDGE.**

smm