



2024:KER:3999

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN
FRIDAY, THE 12TH DAY OF JANUARY 2024 / 22ND POUSHA, 1945

OP(C) NO. 2242 OF 2023
AGAINST THE ORDER/JUDGMENT OS 513/2021 OF PRINCIPAL MUNSIF
COURT, NEDUMANGAD

PETITIONER/PETITIONER/3RD DEFENDANT:

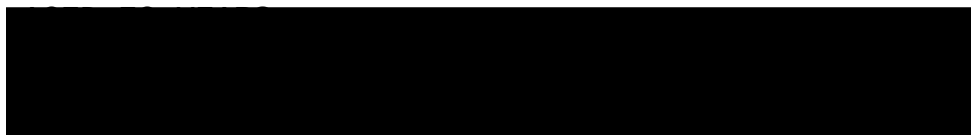
RAJESWARI



BY ADV K.G.BINDU

RESPONDENTS/RESPONDENTS/PLAINTIFFS & DEFENDANTS 1 & 2:

1 OMANA AMMA



2 REMANI



3 REJANI



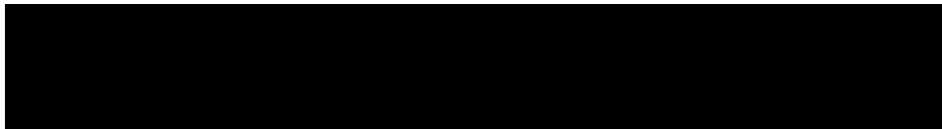
4 RETHI





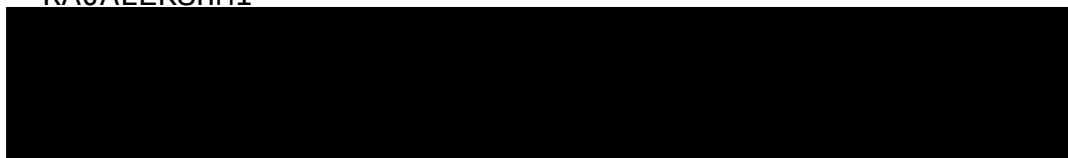
O.P.(C) NO. 2242 OF 2023

5 RADHAKRISHNAN



NEEDUANGAD PALUR, PIN - 695502

6 RAJALEKSHMI



BY ADVS.
SARIN
ABHILASH J
S.GREESHMA SHANMUKHAN(K/001025/2004)

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
12.01.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



JUDGMENT

The petitioner herein is the third defendant in O.S. No.513/2021 of the Principal Munsiff Court, Nedumangad. The petitioner is aggrieved by Ext.P8 order, which dismissed an application under Order XVIII, Rule 16 of the Code of Civil Procedure.

2. Heard the learned counsel for the petitioner and respondents.

3. Learned counsel for the petitioner submits that the suit in question is one for partition, wherein the third defendant entered appearance and filed a written statement claiming under a 'Will', said to have been executed by the deceased Bhaskara Pillai, under whom the plaintiffs and the defendants claim. Two 'Wills' were propounded, one in favour of the petitioner/third defendant and the second in favour of the petitioner's son. Learned counsel pointed out that though there were two witnesses in



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the 'Will', one witness passed away and the remaining witness is aged 78 years. According to the learned counsel, he is ailing as well, in which circumstances, the petitioner filed petition under Order XVIII, Rule 16 C.P.C, before the court below. The learned Munsiff, by relying upon a judgment of the Hon'ble Supreme Court in Laxmibai(Dead) thr. Lrs. and another v. Bhagwantbuva(Dead) thr. Lrs. and others [2013 (4) SCC 97], dismissed the application, holding that no evidence has been adduced by the petitioner as regards the health condition of the attesting witness. The contention of the respondent before the court below to the effect that the said witness is a practicing lawyer in the High Court was also taken stock of.

4. Learned counsel would submit that the above decision of the Hon'ble Supreme Court - relied upon by the learned Munsiff - is on a completely different premise and context, wherein an



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interference was made by the appellate court, for the reason that the respondent therein could have resorted to Order XVIII, Rule 16 C.P.C. Learned counsel invited the attention of this Court to paragraph No.28 of the judgment and what has been discussed by the Hon'ble Supreme Court is that, even assuming such a petition was preferred under Order XVIII, Rule 16 C.P.C, the trial court could not have allowed the same. According to the learned counsel, the same decision will not apply to the attendant facts and circumstances of this case.

5. Per contra, this application was seriously opposed by the learned counsel for the respondents. Learned counsel would point out that there was no material to show that the witness was aged and ailing. Therefore, the view taken by the learned Munsiff cannot be faulted. A detailed counter affidavit has been filed in this Original Petition, wherein it is claimed that the witness sought to be



examined is an advocate, practicing in the High Court and he is a healthy person. It was also pointed out that the suit is only at the stage of framing the issues and there is no necessity to invoke the extra ordinary remedy under Order XVIII, Rule 16 C.P.C.

6. Having heard the learned counsel appearing on both sides, this Court finds merits in the submissions made by the learned counsel for the petitioner. The primary aspect to be taken note of is that the petitioner is relying upon two 'Wills', in order to defend a claim for partition. In both these 'Wills', there were two attesting witnesses, of whom, one is no more. It is specifically averred that the remaining attesting witness is aged 78 years, besides ailing to. It is true that the respondents herein have filed objections disputing the above claims of the petitioner. However, this Court is of the opinion that the petition under



Order XVIII, Rule 16 C.P.C, in the context of proof of a 'Will', will have to receive a separate and lenient consideration, in as much as, it is imperative, going by Section 68 of the Evidence Act, as also, by Section 63 of the Indian Succession Act, to examine at least one of the attesting witnesses, in proof of the 'Will'. The legal position may not be as if a 'Will' cannot be proved, if both the attesting witnesses are not alive. However, the ideal course would be to prove the 'Will' in accord with the statutory mandate as referred to above, by examining at least one among the attesting witnesses. Even the respondents would agree that the surviving attesting witness is aged 70 years, whereas it is the claim of the petitioner that he is aged 78 years. In such circumstances, it was only just and proper that the application was allowed by the learned Munsiff, so as to ensure that the remedy available to the petitioner to prove the 'Will' is not to lost by virtue of any untoward event of the



death or inability of the surviving witness to tender evidence. This Court has perused the judgment of the Hon'ble Supreme Court relied upon by the learned Munsiff, in choosing to dismiss the application vide Ext.P8 order. That is a case where, the adoption of a person was one among the relevant issues. The suit was decreed by the trial court, holding that the adoption is valid. A civil appeal was preferred, in which the decree of the trial court was reversed. The adoption was frowned upon for the reason that independent witnesses were not examined and that witnesses examined were interested witnesses. While arriving at such conclusion, the appellate court chose to draw adverse inference for the reason that the appellant/plaintiff was not examined by invoking the provisions under Order XVIII, Rule 16 C.P.C, considering her old age. The Hon'ble Supreme Court found that even if such an application was moved to examine the appellant/plaintiff, the trial court could not have



allowed it, considering the fact that the appellant was just above 70 years of age and was hale and hearty. It was also indicated that she was not suffering from any serious ailment; nor was she in her death bed and thus there was no occasion to file an application under Order XVIII, Rule 16 C.P.C. These observations cannot be taken as a mandate or dictum of the Hon'ble Supreme Court that a person in the death bed, or for that matter a person who is suffering from any serious ailment, alone can be examined by invoking the provisions under Order XVIII, Rule 16 C.P.C. The language employed in Order XVIII, Rule 16 C.P.C. would indicate that where a witness is about to leave the jurisdiction of a court or in cases where other sufficient cause is shown to the satisfaction of the court as to why his evidence should be taken immediately, the court may take such evidence of the witness on an application preferred by the party or the witness. As already indicated, the bone of contention was on the



strength of a 'Will', wherein examination of at least one among the attesting witness is a sine qua non to prove the 'Will'. There is no dispute that the surviving witness is aged, although, the respondent would contend that he is aged only 70 years. In the backdrop of the facts and circumstances narrated above, the application ought to have been allowed.

7. In the light of the above discussion, Ext.P8 order is set aside and Ext.P3 application will stand allowed. There will be direction to the learned Munsiff to record the evidence of the witness without further delay and proceed with the suit, in accordance with the law.

This Original Petition is disposed of, as above.

Sd/-
C. JAYACHANDRAN
JUDGE



APPENDIX OF OP(C) 2242/2023

PETITIONER'S EXHIBITS

- Exhibit P1 TRUE COPY OF THE PLAINT IN O.S. NO. 513/2021 FILED BY THE RESPONDENTS 1 TO 4/ PLAINTIFFS DATED 9/9/2021
- Exhibit P2 TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER/3RD DEFENDANT DATED 27/1/2022
- Exhibit P3 TRUE COPY OF THE I.A. NO. 06/2021 IN OS 513/2021 OF THE MUNSIFF COURT NEDUMANGAD.DATED 24/11/2021
- Exhibit P4 TRUE COPY OF THE DEATH CERTIFICATE OF MR. V.G. SASIKUMAR, ONE OF THE WITNESSES OF THE AFORESAID WILLS DATED 21/9/2021
- Exhibit P5 TRUE COPIES OF WILL NO. 333/3/2018 DATED 8/11/2018
- Exhibit P6 TRUE COPIES OF WILL NO. 334/3/2018 DATED 8/11/2018
- Exhibit P7 TRUE COPY OF THE WRITTEN STATEMENT IN OS 513/2021 OF THE MUNSIFF COURT, NEDUMANGAD DATED 29/6/2022 FILED BY THE 5TH RESPONDENT/1ST DEFENDANT
- Exhibit P8 TRUE COPY OF THE ORDER DATED 02/08/2022 IN I.A. NO. 06/2021 IN OS 513/2021 OF THE PRINCIPAL MUNSIFF COURT NEDUMANGAD