IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

TUESDAY, THE 9TH DAY OF MAY 2023 / 19TH VAISAKHA, 1945

RFA NO. 139 OF 2008

AGAINST THE ORDER/JUDGMENT IN OS 292/2004 OF ADDITIONAL SUB COURT, PALAKKAD DATED 17.08.2007

APPELLANT/PLAINTIFF:

1 P.NANIKUTTY,(EXPIRED)
WIDOW OF K.N. VASUDEVAN
RESIDING AT KOOTTALATHODI HOUSE, PARUTHIPULLY PO.,, ALATHUR TALUK, PALAKKAD DISTRICT.

2 K.V PADMANABHAN
AGED 67 YEARS
S/O LATE P NANIKUTTY, RESIDING AT KOOTTALATHODI HOUSE, PARUTHIPPULLY P.O, ALATHUR TALUK, PALAKKAD DISTRICT. (PETITIONER IN IA 2286/15 WHO IS ONE OF THE LEGAL REPRESENTATIVE OF DECEASED SOLE APPELLANT IS IMPLEADED AS ADDITIONAL 2ND APPELLANT AS PER ORDER DATED 3/11/2015 IN IA 2286/2015.)

BY ADVS.SRI.T.C.SURESH MENON
SRI.P.S.APPU
SRI.JIBU P THOMAS

RESPONDENTS/DEFENDANTS:

1 K.U.KALPAKADEVI,
WIDOW OF K.V.NARAYANANKUTTY,

2 N.SHEEJA D/O. K.V.NARAYANANKUTTY

3 N.PREEJA D/O. K.V.NARAYANANKUTTY
ALL ARE RESIDING AT THANNISSERY, PERUVAMBA PO., PALAKKAD DISTRICT.

*4 PADMAJA
AGED 68 YEARS
W/O LATE HARIDAS C, AGED 68 YEARS, RESIDING AT KANDATH HOUSE, DEVI MANDIRAM, CHITTUR, PALAKKAD – 678 101 (THE OTHER LEGAL REPRESENTATIVE OF DECEASED FIRST APPELLANT IS IMPLEADED AS ADDITIONAL R4 AS PER ORDER DATED 6/01/2016 IN IA 2286/2015)

BY ADVS.SRI.K.V.SOHAN
SMT.SREEJA SOHAN.K.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION ON 20.03.2020, THE COURT ON 09.05.2023 DELIVERED THE FOLLOWING:

C.R.

MARY JOSEPH, J.

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R.F.A. No. 139 of 2008

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Dated this the 9th day of May, 2023

JUDGMENT

Appeal on hand is filed by the unsuccessful plaintiff in O.S. No.292/04, which is a suit for partition on the files of Subordinate Judges (Additional) Court, Palakkad. The suit for partition was dismissed by the trial court on arriving at a finding that the plaint schedule property is not partible for the reason that a Will was executed by the deceased Narayanankutty in favour of his wife, the 1st defendant and the Will has been acted upon, on his death.

2. The contention of Sri.P.S.Appu, the learned counsel for the appellant/plaintiff was that the judgment and decree under challenge are passed by the trial court erroneously on the basis of improper appreciation of evidence. According to the learned counsel, the appellant and defendants are governed by Hindu Mitakshara Law and on the death of original plaintiff's son,

intestate, the plaintiff being the mother is entitled to get 1/4th share of the plaint schedule property. According to him, the alleged execution of the Will marked in evidence as Ext.B1 is shrouded with suspicion and it ought not to have been relied upon by the trial court for declining the relief of partition against the plaintiff. According to him, Ext.B1 is silent of the recitals about the cause for the testator to disinherit his mother and devoid of any special reason stated therein as to why the entire property belonging to the testator has been bequeathed solely to his wife, leaving his mother and even the two daughters he was having. It is contended by the learned counsel that the Will recites payment of Rs.2,50,000/- each to the married and unmarried daughter and the proposition is unnatural. At the time when the testator has executed the Will, the marriage of the 1st daughter was over and she might have been married away, spending huge money and giving gold ornaments. According to the learned counsel, it is unlikely for the testator to direct the beneficiary of the Will, the 1st defendant to pay Rs.2,50,000/- each to the married and

unmarried daughter and that should tend the Court to view the Will with suspicion.

3. Inviting the attention of this Court to the evidence tendered by the 1" defendant, the learned counsel contended that there was no reason for deceased Narayanankutty, the alleged testator of the Will to execute the same at his age of 45 years, when he was in a state of healthy physical condition and devoid of any disease. According to the learned counsel, the execution of a Will by the testator at his youth and healthy condition, creates suspicion and the trial court ought to have adverted to that aspect while appreciating the evidence. It is contended by the learned counsel that the deceased Narayanankutty has two daughters and the bequeath of the entire property in favour of his wife evading the two daughters is also a suspicious circumstance to doubt the genuineness of Ext.B1. Inviting the attention of this Court to page No.2 of the Will, it is contended by the learned counsel that the writings there is dissimilar to that found in other pages of the Will. According to him, in page 2, more matters have been

incorporated, without leaving adequate space and that gave an indication of obtaining signed papers from the deceased Narayankutty by the 1st defendant and making use of those for creation of Ext.B1. According to the learned counsel, if the document was a genuine one the contents must have been entered in a proportionate manner and signatures of deceased Narayanankutty must have been obtained in each pages.

4. The learned counsel has also drawn the attention of this Court to the attestors of the Will to contend that neither the friends of Mr.Narayanankutty nor his relatives were made to sign it. According to him, the 1st witness Devadas is the brother of the 1st defendant and the 2nd witness Rajith is the first cousin of the 1st defendant. The learned counsel urged that non-procuring of any of the relatives or friends of deceased Narayanankutty to attest the Will itself throws suspicion regarding the attestation and genuineness of Ext.B1. Only one among the attestors of the Will was examined by the 1st defendant before the trial court as witness and the other one, the brother of the 1st defendant was not examined by her.

5. The attestor who was examined before the Court as DW2 has given the version that herself along with Narayanankutty and the other attestor went to the office of the scribe to execute the same and at that point of time the Will was kept written. It was also urged by the counsel that when DW1 was cross examined, she has tendered evidence to the effect that she came to know about the Will executed by her husband in her favour only one month after his death. It is contended by the learned counsel that the version of DW1 is falsehood, when viewed in the backdrop that attestors to the Will are her brother and cousin. According to him, the attestors being such close relatives, it is unbelievable that they would suppress the factum of execution of Will by Narayanankutty in favour of the 1st defendant. It is urged by the learned counsel that mere admission of the signature in the Will by the attestor will not tantamount to execution of the Will. Referring to the circumstances, it is contended by the learned counsel that those create suspicion on execution of the Will by deceased Narayanankutty in favour of the 1st defendant and the trial

court ought not to have overlooked those aspects to reach a conclusion that the Will was properly executed by the deceased in favour of the 1st defendant and thereby the plaint schedule property is turned non-partible. It is further contended by the learned counsel that when the plaintiff has a specific case that the Will was a document manipulated by the 1st defendant, he ought to have summoned and examined the scribe of the Will. According to him, the failure of the defendant to examine the scribe is a doubtful circumstance projected by him and the trial court is perfectly unjustified in holding that the Will is a genuine instrument executed by the deceased in favour of the 1st defendant.

6. Another contention was also raised by the learned counsel that when the execution of the Will is claimed by the defendant and denied by the plaintiff, the trial court ought to have framed an issue regarding the genuineness of the Will and must have answered it. Inviting the attention of this Court to the issues framed by the trial court, the learned counsel submits that the issue of the nature was not raised by the Trial

Court. The learned counsel in the said circumstances invited this Court's attention to Order XL CPC to contend that when rival pleadings have been raised by the parties, the trial court shall frame issues on its basis so as to lead, the parties to adduce evidence on it. The learned counsel has pointed out that it is a lacuna which would render the judgment erroneous.

7. The learned counsel has invited the attention of this Court to **Apoline D'Souza v. John D'Souza** [(2007) 7 SCC 225] to rest his contention that the scribe has to be examined to establish execution of the Will. Learned counsel has relied on paragraphs 8 & 9 of the decision cited supra, which are extracted hereunder :

> "8. The testatrix was a 96 years old lady. She had been suffering for a long time. She was bedridden. No evidence has been brought on record to show as to who had drafted the will.
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> 9. Even if it be assumed that the appellant had nothing to do in regard to preparation of the draft or registration thereof, nothing has been brought on record to show as to who had drafted the will, or at whose instance it came to be registered."

8. Per contra, the learned counsel for the 1st defendant has contended that the Will relied on by the 1" defendant is a genuine one and the execution of the same is established by examining one of the attestors as DW2. According to her, DW2 has deposed to the effect that herself, the other witness and the attestor had gone together to the office of the scribe and got the Will written there, which was firstly signed by the attestor, secondly by the 1st witness and thirdly by herself. According to him, the attestor signed the Will in her presence and also before the scribe and the other witness to it. According to the learned counsel, the version of witness DW2 was not controverted though cross examined elaborately. Learned counsel has invited this Court's attention to Section 68 of the Evidence Act to contend that for execution of a Will there must be attestation by two witnesses and to establish execution, one among the attesting witnesses must be examined before the Court. According to her, the second witness to the Will was examined before the trial court as DW2 and he has categorically deposed about affixture of signature in

the Will by the testator and attestation of the same by herself and the other witnesses. He has also successfully traversed the lengthy cross examination on material aspects. Therefore, it is contended by the learned counsel that the attestation of the Will is satisfactorily established by the 1st defendant.

9. The learned counsel has drawn the attention of this Court to **Gopinathan Nair Maheswaran Nair v. Madhavi Amma Nirmala Bai and others** [2019 (3) KHC 950] to contend that the scribe of a Will need not be examined as an attesting witness. According to him, the circumstances requiring the examination of the scribe will arise only when something which would show his stand as attesting witness is discernible from the document or at least some indication in that behalf is discernible therefrom. According to the learned counsel, from the Will in the case on hand, it cannot be discerned that the scribe is also an attesting witness. Therefore, according to the learned counsel for the 1st defendant, the contention of the learned counsel for the plaintiff is devoid of any merits. The scribe is also required to

be examined, in a suspicious circumstance, to prove attestation of Will is devoid of merits and is liable to be discarded. The learned counsel has also cited **Pattu v. Krishnammal alias Singari (LR of deceased) and others** [2017 KHC 3051] to substantiate her contention that the scribe need not be examined to establish execution of Will. The learned counsel has relied on paragraph 24 which is extracted hereunder :

> "24. For proof of a document, there may be more than one witnesses like the scribe of the Will in this case. When one of the attesting witness is examined and subjected himself to be cross- examined, mere non-examination of the other attesting witness, who happen to be the scribe also, will not render the Will duly executed an in-genuine document. Under the Evidence Act, the value of the evidence is appreciated not by quantity but, by quality. No law or judgment subscribes that when the scribe of the Will is one of the attesting witness, he is the best witness and he alone is competent to depose about the execution of the Will."

10. According to the learned counsel, it is not inscribed in any law or judgment that the scribe being one of the attesting witness, is the best witness and he or she alone is competent to depose about the execution of the Will. It is urged by the

learned counsel that the plaintiff was residing with the brother of the husband of the 1st defendant and in the suit filed by deceased Narayanankutty, against his brother and the plaintiff, both of them were represented by a single counsel. According to her, both of them had taken a hostile stand in the suit against the husband of the 1st defendant and that itself is an indication that the relationship of the plaintiff and the husband of the 1st defendant was a strained one. According to the learned counsel, the brother of deceased Narayanankutty, was behind the plaintiff and is instrumental in causing the present Suit to be filed by her, with some ulterior motives. The learned counsel has drawn the court's attention to the evidence tendered by PW1 that only the 1st defendant had signed the document executed while selling the property belonging to her son Narayanankutty, after his death as a legal heir. Therefore, the contention of the learned counsel was that PW1 was aware about execution of the Will by her son in favour of the 1st defendant and it was acted upon in the year 2002 itself. According to the learned counsel though PW1 was aware of

execution of the Will in the year 2002, she did not raise a challenge of its execution at that point of time, but has approached this Court seeking for partition only in the year 2004. According to the learned counsel, the belated filing of the suit itself indicates that she was motivated by the brother of deceased Narayanankutty to do accordingly.

11. According to the learned counsel, the recitals in the Will itself explain the reason for bequeathing the entire property in favour of the 1st defendant. According to her, since the plaintiff was in hostile terms to her son, the husband of the 1st defendant, and the latter being the only person taking care of him at the relevant time and the confidence of the testator that the 1st defendant will look after him for the rest of his life and also will take care of his children that he had executed the Will solely in favour of the 1st defendant. According to her, the property was sold by the 1st defendant to some third parties and out of the sale consideration received, as recited in the Will, Rs.2,50,000/- each was given to the two daughters and thereby the Will was acted upon. It is evident from Ext.B3 that

the 1st defendant is paying the land revenue in respect of the plaint schedule property. According to her, the plaintiff was well aware of the execution of the Will in favour of the 1st defendant and she cannot be heard to contend that she came to know about the same only when the written statement was filed by the 1st defendant in the Suit, is an utter falsehood. According to the learned counsel, there is no merit in the plaintiff contending before this Court that the circumstances pointed out by her are erroneous ones, to view the Will as not a genuine one. According to her, the circumstances to which attention is drawn by the learned counsel for the plaintiff are devoid of any merits and the judgment under challenge is only to be confirmed.

12. It is the case of the plaintiff that since her son Narayanankutty died intestate, they being governed by Hindu Mitakshara Law, she is entitled to get 1/4th share in the property scheduled in the plaint. According to her, her deceased son was survived by herself, his wife and two daughters as the legal heirs. The property being partible, she

seeks for a decree of partition, allocation of her share in it and grant of the same in her favour. In the written statement, the 1st defendant has taken a specific contention that the deceased husband had executed a Will in her favour and almost one year after execution of the Will, her husband died. According to her, the property that stands in the name of her husband, being bequeathed by the Will in her favour, the plaint schedule properties are not partible and the plaintiff is not entitled to obtain a decree for partition and allocation of share.

13. According to the learned counsel for the plaintiff, the Will is a forged document created by the 1st defendant, after obtaining the signatures of her husband in blank papers. According to him, the plaintiff was not aware of the execution of the Will by her deceased son in favour of the 1st defendant and came to know about that only when written statement was filed by her in the suit. Thereupon, she had filed a rejoinder incorporating the pleadings with reference to the fraudulent act of the 1st defendant in the matter of creation of the Will. The learned counsel has contended that though such a plea was

raised by him and the execution of Ext.B1 was disputed, a specific issue on that was not raised by the trial court. It is true that under Order 40, CPC when the plaintiff avers a factum and the defendant disputes the same, an issue must be raised by the trial court for enabling the parties to adduce evidence in that regard. The trial court must answer all the issues based on the evidence adduced by the parties. It is true that among the issues framed by the trial court in the case on hand, the particular issue referred to above does not find a place. In that regard it is pertinent to look into the pleadings in the plaint to see whether a plea regarding forgery of the Will was raised in the plaint. A reading of the plaint made it clear that such a plea does not find a place therein. The learned counsel has submitted that such a plea was there in the rejoinder filed by her following the filing of the written statement by the 1st defendant. According to the learned counsel, the execution of the Will was a new information to the plaintiff received from the pleadings in the written statement filed by the 1st defendant

and therefore that the rejoinder was filed incorporating the plea of fraud in creation of the Will by the 1st defendant.

14. Then the question comes whether the rejoinder filed by plaintiff after receiving the written statement of the defendant will form part of the plaint and the averments incorporated therein can be treated as averments in the plaint. The answer to the same is negative for the following reasons. Order VI Rule 1 defines pleading to mean plaint or written statement. Order 2 provides that pleadings must state material facts. Rule 2 of Order VI which contain three parts is extracted hereunder :

> "**2. Pleading to state material facts and not evidence**
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> (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.
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> (2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.
>
> (3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words."

15. Rule 4 of Order VI provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and item if necessary) shall be stated in the pleading. Rule 7 provides that no pleadings shall, except by way of amendment, raise any new ground of claim or contain an allegation of fact inconsistent with the previous pleadings of the party. Rule 10 provides that wherever it is material to allege malice, fraudulent intention, knowledge or other conditions of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is inferred. Rule 14 provides that every pleadings shall be signed by the party and his pleader (if any). Rule 14 contains a proviso which states that where a party pleading is by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or defend on his behalf. Rule 15 provides

verification of pleadings. Rule 17 of Order VI provides for amendment of pleadings which reads:

"**17. Amendment of pleadings**

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

PROVIDED that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Rule 18 of Order VI which provides for the consequences, following obtaining an order by a party for leave to amend the pleadings in his favour, is extracted hereunder:-

"**18. Failure to amend after order**

If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as

aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court."

Order VII Rule 1 provides for the particulars to be contained in the plaint and is extracted hereunder :

"**1. Particulars to be contained in plaint**

The plaint shall contain the following particulars:-

(a) the name of the court in which the suit is brought;

(b) the name, description and place of residence of the plaintiff;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) the facts constituting the cause of action and when it arose;

(f) the facts showing that the court has jurisdiction;

(g) the relief which the plaintiff claims;

(h) where the plaintiff has allowed a set off or relinquished a portion of his claim the amount so allowed or relinquished; and

(i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits."

16. Therefore, it is incumbent upon the party who proposes to seek a relief from the Court, to prepare a plaint

incorporating the particulars mentioned in Rule 1 of Order VII and file it before the Court after verification of the pleadings and signing the same. All material facts which the party proposes to rely on to get the relief must be precisely stated in the plaint. The party need not refer to in the plaint, the evidence which he proposes to adduce to obtain the relief. As stated in Rule 4 of Order VI a party relies on misrepresentation, fraud, breach of trust, willful default or undue influence, shall raise a precise plea about that in the plaint. As contemplated by Rule 17 of Order VI, a party shall be free to seek for an amendment at any stage of the proceedings, if he finds that the real question in controversy among himself and the opposite party, could be adjudicated and arrived at properly.

17. The Court has discretion in the matter of granting an order permitting amendment by a party. The court has to see whether the amendment sought is necessary for the purpose of determining the real questions in controversy between the parties in the Suit. The only reservation was that when the trial

has commenced, an application seeking amendment shall not be allowed unless the Court comes to the conclusion that despite due diligence, the party could not raise the matter before the commencement of trial. Rule 18 is a stringent provision which provides that a party who has obtained an order for amending the plaint by incorporating new pleadings, in case the time limit for carrying out it is not stipulated there, he has to carry out the same within 14 days from the date of the order and unless further time is not obtained from the Court by applying for that, the party shall not be permitted to amend the same. Therefore, the Code mandates that all pleadings which are necessary and material for a party to obtain the relief must find a place in the plaint either originally when it was filed, or later on brought in by way of amendment of the pleadings. Order VI Rule 17 enables a party to bring into the plaint any pleadings which it has omitted to incorporate in the plaint originally and are inevitable for a proper adjudication of the issues already involved and grant of reliefs. The court where the amendment of the plaint is applied for, is duty bound

to look into the pleadings proposed to be incorporated and be convinced of the necessity for incorporating the same in the plaint. The amendment will in the normal circumstances be restrained by the Court only when it was applied for by the party after the commencement of the trial and on being convinced that the party failed to raise it before the commencement of the trial despite due diligence.

18. From the above discussion it is clear that a party seeking to obtain a relief by filing a plaint is not entitled to seek for consideration of the pleadings raised by him at a later point of time in the form of a rejoinder, as part of the plaint. The Code does not provide for such a recourse. It is clear from Order VI and VII referred to supra that a party seeking for a relief in a suit must incorporate all relevant and material pleadings in the plaint. If due to oversight, a party fails to incorporate any relevant or material pleadings in the plaint, he can have it incorporated by filing an application under Order VI Rule 17.

19. He must see that the application was filed before commencement of the trial. Even if the application was filed after the commencement of trial, he must convince the court that the pleadings sought to be incorporated by way of amendment were brought to his notice belatedly despite exercise of due diligence. In view of the above provisions, the pleadings incorporated in a rejoinder will never form part of the plaint. A party is not entitled to seek the court which is seizin of his suit to read the pleadings in the rejoinder alongwith those in the plaint. A party may bring additional pleadings into the plaint only through the process of amendment as envisaged under Order VI Rule 17 and by no other means. Only when the pleadings are specifically incorporated into the plaint, the party is entitled to adduce evidence on its basis. In the absence of any evidence adduced without a plea being raised in the plaint originally or additionally by way of amendment, that will be devoid of basis and irrelevant.

20. A look at the plaint reveals that pleadings on any of the vitiating elements as contemplated under Rule 4 of Order

VI (fraud in the case on hand) was taken in the plaint. True that a pleading in that regard was found incorporated in the rejoinder, but it cannot be taken as forming part of the plaint. Therefore this is a case wherein a pleading that the Will is a forged document is not raised in the plaint. That being so, the argument advanced by the learned counsel that an issue was not raised specifically on the genuineness of the Will is totally devoid of merits and is discarded. For want of a specific pleading in the plaint and specific denial of that in the written statement filed by the defendant, there is absolutely no scope for the trial court to raise it as an issue.

21. The 1st defendant has contended that the property scheduled in the plaint is impartible for the reason that the same has been bequeathed by her deceased husband in her favour. The Will is produced by her and is marked in evidence in the case on hand as Ext.B1. It is pertinent to note that the marking of the document is not disputed by the plaintiff. Even in the absence of any opposition raised against marking of the

document, it is incumbent upon the party relying on the document to prove it's execution.

22. How a Will is to be proved is provided under Section 68 of the Indian Evidence Act, 1872. It provides that execution of a Will shall be established by examining one among the persons who stand as attestors to it. As contemplated under Section 63 of the Indian Succession Act, 1925, two attestors are there for Ext.B1. The 2nd attestor was examined as DW2. DW2 has categorically stated that he had witnessed signing of Ext.B1 by the husband of the 1st defendant as its attestor, and signing of it by the brother of the 1st defendant as a witness to Ext.B1 prior to himself signing the document. Scrutiny of the oral evidence tendered by DW2 led no room for treating him as an incredible witness. He has spoken about the execution of the Will by the testator and the attestation by himself and the other attestor. The non-examination of the brother of the 1st defendant who was the first attestor to Ext.B1 is not a crucial matter. Section 68 only envisages the examination of one among the two attestors to establish the execution of the Will.

23. The other contentions raised by the learned counsel for the plaintiff are indications to point out that Ext.B1 was a forged document, will not sustain for the reason that a specific plea regarding the fraud, an element vitiating its execution was not taken in the plaint as contemplated under Rule 4 of Order VII. Such argument will not sustain for want of a pleading to that effect incorporated in the plaint. The contention of the learned counsel that exclusion of the plaintiff, the mother of the deceased from inheritance of the property of her son, though is a doubtful circumstance pointing at the propriety of execution of Ext.B1 is not liable to be dealt with by the court below, since a plea to that effect is not specifically raised in the plaint. It is the testator's mindset that formed the basis for a bequeath to act in favour of any person. The love, affection and the care tendered by a party to him will form the basis for execution of a Will in favour of former. The mindset of the testator cannot be established by a party who has been benefited by the bequeath. A beneficiary can only prove that the Will was properly executed by the testator in the presence

of two witnesses who have witnessed and attested the execution. As held by the Madras High Court in **Pattu**'s case supra, no law or judgment provides that when the scribe of the Will is one of the attesting witness, he is the best witness and he alone is competent to depose about the execution of the Will. Taking a view that the scribe being an attesting witness is more competent than the other attesting witnesses, being as such, will act against Section 68 of the Evidence Act, which only directs that one among the attesting witnesses is required to be examined to prove the execution of a Will. If the scribe is an attesting witness to the Will, he can be examined as an attestor to establish the execution of the Will and his competency will only be equivalent to the other attesting witness. In the decision cited supra by the plaintiff, the Apex Court had made the observation in paragraphs 8 & 9 as extracted supra in a context wherein a legatee of Will has applied for grant of letters of administration (who was the son of the sister of the testatrix) in the backdrop of certain suspicious circumstances that the testator has stated the

document as a handwritten one whereas the original was one typed in Kannada and there is absolutely no evidence to show that the contents of the Will were read over and explained to the testatrix. In such circumstances of want of material evidence and availability of suspicious evidence that the Apex Court has observed that the legacy has not taken steps to examine the scribe to establish the preparation of the draft or registration thereof. It is an exceptional circumstance wherein even the attesting witness was unable to say about the language in which the Will was prepared, though the Apex Court has found the failure of the party who has relied on the document to examine the scribe to establish its preparation as a material omission. There is no prescription in law that for establishing the execution of a Will the scribe must be examined. The examination of a scribe can be resorted to when he is an attesting witness to the document. In all other circumstances the law did not contemplate examination of a scribe to establish the execution of the Will.

24. In the case on hand, the 1st defendant, the respondent in the appeal has successfully established the execution of Ext.B1 Will and based on the evidence, the trial court has found that the plaint schedule property is not partible and thereby declined to grant a decree for partition and allocation of shares in favour of the plaintiff. A legal and valid ground is not found to disturb the judgment of the trial court under challenge.

Appeal fails for the reasons and is dismissed. Parties shall bear their respective costs.

Sd/-
MARY JOSEPH
JUDGE

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