2025:KER:29767

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

TUESDAY, THE 8TH DAY OF APRIL 2025 / 18TH CHAITHRA, 1947

RSA NO. 159 OF 2011

AGAINST THE JUDGMENT&DECREE DATED 20.01.2011 IN AS NO.224 OF 2007 OF ADDITIONAL DISTRICT COURT, ERNAKULAM ARISING OUT OF THE JUDGMENT &DECREE DATED 30.03.2007 IN OS NO.258 OF 2005 OF III ADDITIONAL MUNSIFF COURT, ERNAKULAM (RENT CONTROL)

APPELLANTS/APPELLANTS/DEFENDANTS:

1 P.D.PARAMESWARAN PILLAI
AGED 69 YEARS
H/O.SULOCHANA AMMA,MARACHERY VEEDU,KEEZHUMADU,, ALUVA.

2 T.P.SATHEESHKUMAR AGED 49 YEARS
S/O.SULOCHANA AMMA,THOTTUNKAL VEEDU,KEEZHUMADU,, ALUVA.

3 T.P.KANAKAM GOPINATH AGED 45 YEARS
D/O.SULOCHANA AMMA,MARACHERY VEEDU,KEEZHUMADU,, ALUVA.

4 T.P.DHANALAKSHMI VIJAYAN AGED 43 YEARS
MARACHERY VEEDU,KEEZHUMADU,ALUVA.

5 T.P.JAYAKUMAR AGED 41 YEARS
S/O.SULOCHANA AMMA,MARACHERY VEEDU,KEEZHUMADU,, ALUVA.

6 UDAYAKUMAR AGED 39 YEARS
S/O.SULOCHANA AMMA,MARACHERY VEEDU,KEEZHUMADU,, ALUVA.

BY ADVS.
SRI M NARENDRA KUMAR
SMT.LAYA SIMON
SRI.P.B.PRADEEP

RESPONDENTS/RESPONDENTS/PLAINTIFF:

1 T.N.RAMACHANDRAN NAIR, (DIED LRS IMPLEADED) AGED 71 YEARS,S/O.K.V.NARAYANAN PILLAI,THATTUNKAL VEEDU,, 349/32 (NEDIYATHU PARAMBU) VADAKKUMBHAGOM KARA,, EDAPPALLY NORTH PO,KUNNUMPURAM,KOCHI-24,NOW RESIDING AT THOTTUNGAL HOUSE,KANNOTH TEMPLE ROAD, BEHIND M.K.K.NAIR COLONY, MUPPATHADAM P.O., ALUVA-683 110.

ADDL.R2 AMBIKA RAMACHANDRA, W/O.T.N.RAMACHANDRA NAIR, AGED 62 YEARS,THATTUNKAL VEEDU,, 349/32 (NEDIYATHU PARAMBU) VADAKKUMBHAGOM KARA,, EDAPPALLY NORTH PO,KUNNUMPURAM,KOCHI-24,NOW RESIDING AT MURALI NIVAS, MATHA AMRUTHANANDAMAYI SATHSANGA SAMIDI ROAD,KIZHAKE KADUNGALLOOR, U.C.COLLEGE, P.O.ALUVA-683 102.

ADDL.R3 VINOD T.R., S/O.T.N.RAMACHANDRA NAIR, AGED 36 YEARS,THATTUNKAL VEEDU,, 349/32 (NEDIYATHU PARAMBU) VADAKKUMBHAGOM KARA,, EDAPPALLY NORTH PO,KUNNUMPURAM,KOCHI-24,NOW RESIDING AT MURALI NIVAS, MATHA AMRUTHANANDAMAYI SATHSANGA SAMIDI ROAD,KIZHAKE KADUNGALLOOR, U.C.COLLEGE, P.O.ALUVA-683 102.

ADDL.R4 VIDYA T.R., D/O.T.N.RAMACHANDRA NAIR, AGED 36 YEARS,THATTUNKAL VEEDU,, 349/32 (NEDIYATHU PARAMBU) VADAKKUMBHAGOM KARA,, EDAPPALLY NORTH PO,KUNNUMPURAM,KOCHI-24,NOW RESIDING AT MURALI NIVAS, MATHA AMRUTHANANDAMAYI SATHSANGA SAMIDI ROAD,KIZHAKE KADUNGALLOOR, U.C.COLLEGE, P.O.ALUVA-683 102. (THE LEGAL HEIRS OF DECEASED SOLE RESPONDENT ARE IMPLEADED AS ADDITIONAL R2 TO R4 AS PER ORDER DATED 09.03.2020 IN IA.332/2014.)

R1 BY ADV SRI.VARGHESE PREM

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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JUDGMENT

1. The additional defendants, 2 to 7, who are the legal heirs of the original defendant, are the appellants. Hereinafter, the original defendant is referred to as the 1st defendant. The plaintiff and the 1st defendant are the children of Ammalu Amma. The suit was for the partition of the plaint schedule property having an extent of 15 ½ cents belonged to Ammalu Amma as per Ext.A1 Gift Deed dated 29.02.1980 executed by the plaintiff. Ammalu Amma expired on 02.05.1995. The suit was filed on 16.02.2005.
2. As per the plaint allegations, the plaintiff issued Ext.A3 Notice dated 05.01.2005 to the 1st defendant demanding partition. The 1st defendant sent Ext.A4 Reply dated 10.01.2005 stating that Ammalu Amma had executed Ext.B2 Will dated 23.05.1980 bequeathing the plaint schedule property in favour of the 1st defendant. The plaintiff came to know about Ext.B2 Will only from Ext.A4 Reply. Ammalu Amma never executed such a Will.

She had no mental capacity to execute any such Will on the date of the alleged execution. Ammalu Amma was not in a proper state of mind to make any such disposition due to her old age. Hence, the plaint schedule is liable to be partitioned, allotting half share to the plaintiff.

3. The 1st defendant filed a Written Statement opposing the prayer for partition, contending that Ammalu Amma had executed Ext.B2 registered Will in favour of the 1st defendant, and hence the property is not available for partition. Mutation of the property was effected in favour of the 1st defendant, and she has been paying land tax. The plaintiff is aware of all these matters. The plaintiff never raised any objection till the filing of the suit. When the 1st defendant decided to sell the plaint schedule property to raise some amounts to pay off her debts, the plaintiff approached the 1st defendant and asked to lend Rs.50,000/- out of sale consideration, which the 1st defendant could not give. On account of this enmity, the present suit is filed by the plaintiff with

a false claim.

4. On the death of the 1st defendant during the pendency of the appeal, the additional defendants 2 to 7 were impleaded as her legal representatives.

5. On the side of the plaintiff, the plaintiff was examined as PW1, and Exts.A1 to A4 documents were marked. On the side of the defendants, the 3rd defendant was examined as DW1, and DWs 2 and 3 were examined as attesting witnesses to Ext.B2 Will. Exts.B1 to B5 were marked on the side of the defendants.

6. The Trial Court disbelieved Ext.B2 Will, finding that the defendants failed to prove execution and attestation of Ext.B2 Will as required under Section 63(c) of the Indian Succession Act and accordingly decreed the suit passing a Preliminary Decree for partition allowing the plaintiff to get partition and separate possession of one-half share of the plaint schedule property.

7. The defendants 2 to 7 filed an Appeal before the First Appellate

Court, and the same was dismissed, confirming the judgment and decree of the Trial Court.

8. This Court admitted this Appeal on the following substantial questions of law.

   . Whether the courts below are justified in holding that Ext.B2 is not genuine and valid?

   . Whether the courts below failed to consider the impact of Section 71 of the Evidence Act while considering the proof of Will as enumerated in Sec.68 of the Evidence Act?

   . Whether the genuineness of the Will could be established in the circumstances enumerated in Section 71 of the Evidence Act?

   . Whether the courts below are justified in ignoring registration of the Will in regard to the proof of Will as envisaged under Sec.68 of the Evidence Act?

9. I heard the learned counsel for the appellant, Sri.M. Narendra Kumar, and the learned counsel for the respondent, Sri.

Varghese Prem.

10. The learned counsel for the appellant argued that the defendants could prove the execution of Ext.B2 Will with the aid of Section 70 of the Bharatiya Sakshya Adhiniyam, 2023 (BSA) corresponding to Section 71 of the Indian Evidence Act, 1872 with other evidence since both the attesting witnesses namely, DWs 2 and 3 denied the execution of Ext.B2 Will. The learned counsel contended that since DW2 and DW3 denied the execution of Ext.B2 Will, the Courts should have considered the other evidence available in the suit to have found the execution of Ext.B2 Will. The evidence of DW1, who was present at the time of the execution of Ext.B2 Will, has clearly proved the execution of Ext.B2 Will. Other circumstances also clearly indicate the execution of Ext.B2 Will. The learned counsel emphasized that the object of Section 70 of the BSA is to permit the propounder to adduce other evidence in case the attesting witnesses could not prove the execution of the document for

various reasons. The fate of a document cannot depend upon the whims and fancies of the attesting witnesses. Sometimes, the attesting witnesses may turn hostile in order to help the person challenging the Will. In such case, the courts are not powerless. The court can enquire whether other evidence are available to prove the execution of the Will. The learned counsel pointed out that Ext.B2 Will was executed in the year 1980, whereas the witnesses were examined only in 2007. In view of the evidence of DW1, who was present at the time of the execution of Ext.B2 Will, its execution is proved with the aid of Section 70 of the BSA. In support of his arguments, the learned counsel for the appellant cited the decisions in **Ittoop Varghese v. Poulose & Ors. [1974 KLT 873], Varghese v. Oommen [1994 KHC 396], George v. Varkey [2004 (1) KLT 21], Janki Narain Bhoir v. Narain Namdeo Kadim [2003(2) SCC 91], T.T.Joseph v. K.V Ippunny and others [2007(3) KHC 797], Devassykutty v. Visalakshy Amma [2010 KHC 6233],**

Venugopalan P.A. & Ors. v. P.A. Gouri [2014 KHC 3033], Jagdish Chand Sharma v. Narain Singh Saini (dead) through his legal heirs and others [2015 (8) SCC 615] and **Mannarakkal Madhavi (Died) v. Nangana Dath Pulparambil Devadasan (Died) [2024 KHC OnLine 781].** The learned counsel for the appellant concluded that in view of the evidence of PW1, who was present at the time of execution of Ext.B2 Will and attending circumstances, the defendants have discharged the burden to prove the Will with the aid of Section 70 of the BSA and hence appeal is liable to be allowed answering the substantial questions of law in favour of the appellants.

11. On the other hand, the learned Counsel for the respondent argued that it is clear from the evidence of DW2 and DW3 that their evidence is not sufficient to prove the execution of Ext.B2 Will as required under S.63(c) of the Indian Succession Act. Section 70 of the BSA is attracted only in the situations where the attesting witness denies or does not recollect the execution

of the document. It is a settled law that Section 70 is to be construed strictly. If Section 70 is liberally construed, it would definitely defeat the very purpose for which Section 63 of the Indian Succession Act is enacted for ensuring strict proof of the execution of Will. Any short comings or lacuna in the evidence of the attesting witnesses could not be filled up by examining other witnesses. The learned counsel cited the decision of the Hon'ble Supreme Court **Jagdish Chand Sharma (supra)** the decision of this Court in **Mohandas M C v. C Aravindakshan [2023 KHC 676],** in which the scope and ambit of Section 71 of the Evidence Act is discussed extensively. On the strength of the said decision, the learned counsel concluded that the defendants could not be allowed to invoke Section 70 of the BSA to make up the deficiencies in the evidence of DW2 and DW3 with the evidence of DW1, who is an interested witness since he also obtained benefits under the Will through the 1st defendant and hence, the appeal is liable to be dismissed

answering the substantial questions of law against the appellants.

12. I have considered the rival contentions.

13. Both sides admit that the plaint schedule property originally belonged to their mother, Ammalu Amma, who died on 02.05.1995. Ext.B2 is a registered Will alleged to have been executed by Ammalu Amma. It is well settled that the registration of the Will will not be a proof for the execution of the Will and will not exclude satisfaction of the mandatory requirements of proof of Will as required under Section 63(c) of the Indian Succession Act read with S.68 of the Evidence Act. Both the Courts have concurrently found that the evidence of both the attesting witnesses are not sufficient to prove the execution of Ext.B2 Will. There is no reason or ground to take a different view. The question is whether the defendants can resort to the aid of Section 70 of the BSA to prove Ext.B2 Will by other evidence. Section 70 of BSA/Section 71 of the old

Evidence Act is extracted hereunder.

> **"Proof when attesting witness denies execution:** If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

14. Going by the wording of Section 70 of the BSA, it attracts only if the attesting witness denies or does not recollect the execution of the documents. The Division Bench of this Court, in the decision in **Ittoop Varghese v. Poulose [1974 KLT 873],** held that when the court is satisfied that the witnesses deliberately and falsely denied that they attested the will, the court is entitled to look into the other circumstances and the regularity of the will on the face of it and come to the conclusion on the question of attestation.

15. The decision in **Ittoop Varghese (supra)** is followed by another Division Bench of this Court in the decision in **Chacko v. Elizabeth John [1997(1) KLT 739]** holding that merely because an attesting chooses to deny attestation of the

document, the propounder of the will should not be without remedy; that when the court is satisfied that witnesses deliberately and falsely denied that they attested the Will, court is entitled to look into the other circumstances and the regularity of the will on the face of it and to come to the conclusion on the question of attestation; that the court is not powerless to declare in favour of the Will where attesting witnesses or some of them prove hostile and unreliable, if from other evidence on recorded and the circumstances taken as a whole, the court is in a position to hold that the Will was duly executed and attested; and that inadequacy of the evidence of the attesting witnesses should not stand in the way of granting probate.

16. The above two Division Bench decisions in **Ittoop Varghese** and **Chacko** are followed in the decision of this Court in **Venugopalan (supra)**, in which the learned judge, after referring to various texts on the law of evidence by famous authors, succinctly laid down the scope of Section 71 of the

Indian Evidence Act. It is held that the proof of codicil is in the same manner as in the case of proof of Will, and S.68 of the Indian Evidence Act will apply; that however, if the attesting witnesses for reasons best known to them chose not to support the propounder in proving the due execution of the Will, it is not as if that the propounder has no other option; and that S.71 come to his aid and enables him by circumstantial evidence or other evidence to prove the due execution.

17. In the decision of the Hon'ble Supreme Court in **Janki Narain Bhoir (supra)** it is held that S.71 of the Evidence Act corresponding to Section 70 of BSA is in the nature of a safeguard to the mandatory provisions of S.68 of Evidence Act corresponding to S.67 of BSA, to meet a situation where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive; that it is a permissive and enabling provision and that S.71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been

called failed to prove the execution of the Will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. It is further held that Section 71 has no application in case where one attesting witness who alone has been summoned, has failed to prove the execution of the will and other attesting witnesses, though are available to prove the execution of the same has not been summoned before the Court. The decision in **Janki Narain Bhoir (supra)** is followed by this Court in the decision in **Devassykutty (supra),** in which it is held that only one of the attesting witnesses needs to be called upon to give evidence regarding attestation and execution of the Will is qualified by the fact that the said witness should not only speak about the execution of the document but also about the attestation by both the witnesses; that the attesting witness called upon to give evidence must speak about his own attestation and the attestation by the other witness also

and that if he does not do so, the attestation of the deed could not be said to be duly proved unless the other attesting witness is also called upon to speak about the same.

18. This Court in **Mannarakkal Madhavi (supra)** held that more than one witness at the same time is not necessary under Section 63(c) of the Indian Succession Act; that if one attesting witness can prove the execution of will in terms of S.63(c), namely, attestation by two attesting witnesses in the manner contemplated therein, examination of the other witness can be dispensed with; that Section 63(c) nowhere says both attesting witnesses must be present at the same time or that they must sign simultaneously or that they must also speak the attestation by other witness; that when one attesting witness is unable to speak of the attestation by the other witness, the propounder can examine the other attesting witness to satisfy the mandatory requirement under the said section; that the argument that both attesting witness must also speak attestation by the other

witness is liable to be rejected; that even if the attesting witnesses do not support the propounder's case, the propounder can adduce other items of evidence or rely on circumstances to prove that the will was duly executed by the testator; and that inadequacy of the evidence of the attesting witness would not prevent the court from granting reliefs provided there, are other pieces of evidence to substantiate the case of the propounder.

19. In the decision of this Court in **Varghese (supra**) cited by the counsel for the appellant, it is held that where the evidence of the attesting witnesses is vague, indefinite, doubtful, or even conflicting upon material points, the court is entitled to consider all the circumstances of the case and judge collectively therefrom whether the requirement of the statute has been complied with, it is possible for the Court on an examination of the entire circumstances and evidence to come to a conclusion that recollection of the witnesses is at fault or that their evidence

is suspicious or that they are willfully misleading the court and therefore the court obliged to pronounce in favour of the will regarding the testimony of the witness. In this decision, the learned judge has followed the decision of the Hon'ble Supreme Court in **Jagdish Chand Sharma (supra).**

20. The decision in **Jagdish Chand Sharma (supra**) is cited by both sides to substantiate their contentions. The Hon'ble Supreme Court insisted on a strict interpretation of Section 71 of the Evidence Act corresponding to Section 70 of BSA. It is held that Section 71 cannot be invoked as substitute to mandatory requirements of Section 68 of Evidence Act corresponding to Section 67 of BSA read with Section 63(c) of Succession Act; that if the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71; that such a sanction would not only

be incompatible with the scheme of Section 63 of the Succession Act read with S.68 of the Evidence Act corresponding to S.67 of BSA but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended and that if the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, S.71 of Evidence Act corresponding to S.70 of BSA cannot be invoked to bail the propounder out of the situation to facilitate a roving pursuit.

21. Following the decision of the Hon'ble Supreme Court in **Jagdish Chand Sharma (**supra**),** this court has laid down the following propositions of law in relation to Section 71 of the Indian Evidence Act corresponding to Section 70 of BSA in the decision in **Mohandas. N.C(**supra**)** cited by the counsel for the respondent.

> " VI. S.71 of the 1872 Act, is in the form of a safeguard to the mandatory provision of S.68 to cater to a situation where it

is not possible to prove the execution of the Will by calling the attesting witnesses though alive, i.e. if the witnesses either deny or do not recollect the execution of the Will. Only in these contingencies by the aid of S.71, other evidence would suffice**.**

VII. S.71 of Act 1872 has no application in a case where one attesting witness who alone had been summoned fails to prove the execution of the Will and the other attesting witness though available to prove the execution of the same, failed to be examined.

VIII. S.71 of the Act 1872 is meant to lend assistance and would come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility and cannot be let down without any other opportunity of proving the due execution of the document by other evidence.

IX. S.71 cannot be invoked so as to absolve the party of his obligation Under S.68 read with S.63 of the Act and to

liberally allow him, at his will or choice, to make available or not, necessary witness otherwise available and amenable to jurisdiction of the Court. No premium upon such omission or lapse so as to enable him to give a go - bye to the mandates of law relating to proof of execution of a Will, as contemplated by the statutory provisions.

X. S.71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by S.71 of 1872 Act does not in any manner efface or emasculate the essence and efficacy of S.63 of the Act and S.68 of 1872 Act.

XI. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a Will and his or her denial of the said event or failure to recollect the

same, has to be essentially maintained. Any unwarranted Indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of S.63 of the Act and S.68 of the 1872 Act, otiose.

XII. The benefit of S.71 of the 1872 Act to be available to the propounder only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of S.71 of the 1872 Act.

XIII. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, S.71 of Act 1872 cannot be invoked to bail the propounder out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of S.63(c) of the Act and S.68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

XIV. S.71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in S.63 of the Act and S.68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing.

22. In view of the aforesaid authoritative pronouncements, the law on the point is well settled. When one of the attesting witnesses is examined, and he denies or does not recollect the execution of the document, the second attesting witness is to be

examined if he is alive and capable of giving evidence. If the second attesting witness also denies or does not recollect the execution of the document, the propounder can resort to the aid of Section 70 of the BSA. If the attesting witness deposes that he has seen the testator signing the document, but his evidence is deficient to prove compliance with Section 63(c) of the Indian Succession Act, such deficiency could not be filled up by resorting to Section 70 of the BSA. It is for the court to decide whether it is a case of denial or deficiency of evidence, weighing the evidence of attesting witnesses. If the attesting witnesses does not deny the execution, but purposefully give deficient evidence in order to extend undue help to the parties who challenge the document either under their influence or otherwise, the Court is not powerless in such situation. Strict compliance of Section 63(c) of the Indian Succession Act is mandatory to prove a Will. It should not be diluted by resorting to Section 70 of the BSA. If the benefit under Section 70 of the

BSA is extended in all cases where the execution of the will is not proved by the evidence of the attesting witness, the very purpose for which Section 63(c) of the Indian Succession Act is enacted would be defeated. When the evidence of the attesting witness is deficient to meet the requirements under Section 63(c), it is for the Court to assess the evidence of the attesting witness and come to a conclusion that there is no malafide intention on the part of the attesting witnesses purposefully to help the objectors of the document. If the Court finds that there is malafide intention on the part of the attesting witnesses purposefully to extend help to the objectors of the document, such evidence of the attesting witnesses is to be treated as a case of denial of execution of the document, and the propounder is to be permitted to resort to the aid of Section 70 for other evidence for the proof of execution of the document. Other evidence can be given by the persons who were present at the time of execution of the Will, including the Registrar who

registered the document.

23. In view of the legal propositions laid down in the above authoritative pronouncements let me examine whether DW2 and 3 have denied the execution of Ext.B2 Will in order to attract Section 70 of the BSA.

24. When DW2 was examined in the chief examination, he stated that he saw Ammalu Amma signing the Will, that he saw her signing and affixing a thumb impression at the Registrar's Office, and that he signed as witness for attesting the signature of Ammalu Amma. But in cross-examination, he stated that he had not seen Ammalu Amma earlier signing the document, that he did not know who were the other persons available at the time of signing, that he does not know whether Ammalu Amma signed the document with sound mind; and that he signed as a witness after seeing Ammalu Amma signing the document. In the evidence of DW1, at one stage in the cross-examination, he denies the execution of Ext.B2 Will by stating that he has not

seen Ammalu Amma signing earlier. On account of his evidence that he did not know as to who were present at the time of signing his evidence is not sufficient to prove the attestation of the second attesting witness/DW3. Since DW2 has stated that he has not seen Ammalu Amma signing earlier, it could be concluded that he has denied the execution of Ext.B2 Will.

25. When DW3 was examined, though he admitted that he is the second witness in Ext.B2 and he is the person who has signed therein, he stated that he knew about the Will executed by Ammalu Amma only when Ext.B2 was handed over to him. In the cross-examination, he stated that he has not seen anybody signing the document. So DW3 also did not give evidence to the effect that he has seen Ammalu Amma signing the document. So, the evidence of DWs 2 and 3 in substance is a case of denial denying the execution of Ext.B2 Will. It is not a case of deficiency of the evidence to prove the requirements of

Section 63(c) of the Indian Succession Act. In view of the denial of execution of Ext.B2 Will by DWs 2 and 3, the defendants are entitled to seek the benefit of Section 70 of the BSA to prove Ext.B2 Will by other evidence.

26. Next question is whether there are other evidence to prove the execution of Ext.B2 Will. The defendants are mainly relying on the evidence of DW1. The contention of the learned counsel for the respondent/plaintiff is that DW1 is a beneficiary of the Will, and hence, his evidence could not be relied on. Merely because DW1 is a beneficiary of the Will, it could not be said that his evidence is to be discarded. If the evidence of DW1 is quite natural and reliable, the Court is fully justified in relying on the evidence of DW1 under Section 70 of the BSA.

27. DW1 has sworn Proof Affidavit on 09.03.2007, and on the very same day, he was cross-examined. It is after the evidence of DW1 on 09.03.2007 that DW2 was examined on 19.03.2007, and DW3 was examined on 22.03.2007. So, at the time of

examination of DW1, it could not be said that he had knowledge that Dws 2 and 3 would deny the execution of Ext.B2 Will. The evidence of DW1 is that he also went along with Ammalu Amma to the document writer's office. Since DW1 is a grandson of Ammalu Amma, it is probable that DW1 also accompanied Ammalu Amma to the office of the document writer for the execution of Ext.B2 Will. The specific evidence of DW1 is that the plaintiff had also come along with them on the previous day of registration and it is the plaintiff who had given all the instructions for executing the Will. It is the evidence of DW1 that the scribe Ramapanicker read over Ext.B2 Will to Ammalu Amma and Ammalu Amma signed Ext.B2 Will after understanding the contents of the same in the presence of DWs 2 and 3. DW1 specifically stated that he has seen Ammalu Amma, witnesses, and the scribe signing Ext.B2 Will. He also stated that the Will was executed with respect to the plaint schedule property since the plaintiff insisted that the first

defendant should get the property only after the death of Ammalu Amma and that the important person behind the execution and registration of Ext.B2 Will is the plaintiff himself. Even though DW2 was extensively cross-examined, the plaintiff could not make out anything to discredit the evidence of DW1.

28. Ext.B2 is a registered Will executed in the year 1980. Normally, registration of the Will shall not be used as proof of execution of the Will. In the facts and circumstances of the present case, the registration of the Will coupled with the presumption of official acts under Section 114(e) of the Indian Evidence Act is also one of the material factors to find in favour of due execution of Ext.B2 Will. Ammalu Amma died on 02.05.1995. The plaintiff brought the suit for partition only in the year 2005. If the plaintiff had any right over the plaint schedule property, the plaintiff would have brought the suit for partition within a reasonable time after the death of Ammalu Amma. There is no explanation from the part of the plaintiff for the delay

of nearly ten years in filing the suit for partition. It is proved before the Court that the contention of the plaintiff that Ammalu Amma did not have sound disposing capacity at the time of execution of the Will is not correct. Ext.A1 is the certified copy of Ext.B5 prepared through scribe Ramapanicker. The plaint schedule property was transferred in favour of Ammalu Amma by the plaintiff as per Ext.B5 about three months before the execution of Ext.B2 Will. If Ammalu Amma did not have a sound mind, the plaintiff would not have executed Ext.B5 in her favour. The plaintiff does not have a case that Ammalu Amma suddenly became mentally unsound after the execution of Ext.B5. Exts.B2 and B5 are prepared by the same scribe. The plaintiff, as PW1, even pretended ignorance about Ramapanicker, who prepared Exts.B2 & B5. At any rate, he could not plead ignorance of the person who prepared Ext.B5 executed by him. It would reveal that the plaintiff/PW1 was not deposing the truth before the court. If Ammalu Amma wanted to execute Ext.B2

Will secretly without the knowledge of the plaintiff, she would not have approached the same scribe who prepared Ext.B5, who is known to the plaintiff. The said evidence would clearly indicate that the plaintiff, in all probability, participated in the preparation of Ext.B2 Will as deposed by DW1.

29. The contention of the plaintiff is that he came to know about Ext.B2 Will only when he received Ext.A4 Reply Notice dated 10.01.2005 from the first defendant in reply to Ext.A3 Notice dated 05.01.2005 sent by the plaintiff to the first defendant. In the evidence, DW1 has specifically stated that Ext.A4 is not the reply sent by the first defendant to the plaintiff. The reply sent by the first defendant to the plaintiff is a reply handwritten by his younger brother. There is no evidence to prove that Ext.A4 is the reply sent by the first defendant to the plaintiff. Ext.A3 is a handwritten Notice. Ext.A4 is a typewritten notice alleged to have been sent by the first defendant to the plaintiff. It is difficult to believe that the first defendant sent a

typewritten reply notice by herself to the plaintiff, who is her brother. It probabilize that the plaintiff wanted to avoid the questions regarding hand writing of the person who prepared it. Hence, the contention of the plaintiff that he came to know about Ext.B2 Will only when he received Ext.A4 Reply Notice is also very much doubtful.

30. Hence, in view of the evidence of DW1 and attending facts and circumstances of the case, I am of the considered view that the other evidence, as required under Section 70 of the BSA, is available to prove the execution of Ext.B2 Will even though the attesting witnesses denied execution of Ext.B2 Will. I hold that the plaint schedule property which belonged to Ammalu Amma is not available for partition between the plaintiff and the defendants as Ammalu Amma had executed Ext.B2 Will with respect to the plaint schedule property in favour of the first defendant and, hence, on the death of Ammalu Amma the first defendant became the absolute owner of the plaint schedule

property.

31. The substantial questions of law No. I & IV are answered in the negative, and the substantial questions of law II and III are answered in the affirmative, all in favour of the appellant. In view of the answers to substantial questions of law, this Appeal is allowed without cost, setting aside the judgment and decree passed by the Trial Court, which is confirmed by the First Appellate Court and dismissing O.S.No.258/2005 filed by the respondent/plaintiff in the Munsiff's Court, Ernakulam.

Sd/-

M.A.ABDUL HAKHIM

JUDGE

Jma/shg