

Savithri vs Kalyani

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SooperKanoon Citation : sooperkanoon.com/1439856

Court : Kerala

Decided On : Nov-15-2022

Judge : Honourable Mr. Justice P.Somarajan

Appeal No. : AS/84/2002

Appellant : Savithri

Respondent : Kalyani

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.SOMARAJAN
TUESDAY, THE 15TH DAY OF NOVEMBER 2022 / 24TH KARTHIKA,
1944 AGAINST THE DECREE AND JUDGMENT DATED 06-11-2001 IN
OS 15/1999 OF SUB COURT, KASARAGOD APPELLANT/PLAINTIFF:

SAVITHRI(DIED), AGED 60 YEARS, D/O.LAXMINARAYANA BHAT
AND W/O.VASUDEVA BHAT,HINDU, LANDHOLDER, RESIDING AT
GULUGUNJI IN KUMBDAJE, VILLAGE, P.O.KUMBDAJE,KASARAGOD
TALUK & DISTRICT. ACHUTHA BHAT, AGED 52 YEARS, S/O
VASUDEVA BHAT, GULUNGUNJI KUMBDAJE VILLAGE KUMBDAJE
P.O.KASARGOD DISTRICT. VIDYA, AGED 46 YEARS, WIFE OF

ESHWARA BHAT, #1-118 PADEKARIYA HOUSE, BADAGANNUR, PUTTUR, DAKSHIN KANNADA, KARNATAKA. PIN 574 223. (THE PETITIONERS ARE IMPEADED AS ADDITIONAL APPELLANTS 2 AND 3 IN I.A.NO.1/2018) BY ADV SRI.S.VINOD BHAT SMT. ANAGHA LAKSHMY RAMAN

RESPONDENTS/DEFENDANTS:

1 KALYANI, AGED 65 YEARS (DIED) 2 M.MADHAVA BHAT, AGED 46 YEARS. 3 ANANTHA BHAT, AGED 42 YEARS. 4 VISHNU BHAT, AGED 34 YEARS. 5 VASUDEVA BHAT, AGED 26 YEARS. 6 BALAKRISHNA BHAT, AGED 23 YEARS. THE 1ST DEFENDANT IS THE D/O.LATE LAXMINARAYANA, BHAT AND DEFENDANTS 2 TO 6 ARE THE ONE CHILDREN, OF 1ST DEFENDANT.ALL ARE HINDUS, LANDHOLDERS,, RESIDING AT KHANDERI IN KATUKUKKE VILLAGE AND POST, KAZARGOD TALUK. (IT IS RECORDED THAT THE RESPONDENTS 2 TO 6 AS THE LRS OF 1ST RESPONDENT IN I.A.NO.1/2021). BY ADVS. SRI.MILLU DANDAPANI SMT.SUMATHY DANDAPANI SR. SRI. K.P.DANDAPANI SR.

THIS APPEAL SUITS HAVING COME UP FOR HEARING ON 15.11.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

A suit for partition was dismissed by the trial court based on the Ext.B1 Will relied on by the defendants, that is, defendant Nos. 1 to 6, mother and her male children. The legatees under the Will are the male children, that is, defendant Nos.2 to 6. The property originally belonged to Laxminarayana Bhat. The plaintiff and the 1st defendant are the two daughters of the abovesaid Laxminarayana Bhat, the testator. In order to prove the will one of the attesting witnesses who was alive at that time was examined as DW2. Will was executed and registered on 23.08.1978. The testator died long after the execution of the abovesaid Will, that is, in the year 1982 and the present suit for partition was filed in the year 1999, after the lapse of

a long period of more than 21 years from the date of the alleged execution and registration of Ext.B1 Will. The learned counsel for the appellant/plaintiff submitted that the trial court went wrong in appreciating the manner in which a Will or a testament has to be executed and attested and the requirement under Section 63(c) of the Indian Succession Act. It is submitted that there is nothing in the document in order to show that the testator had affixed his signature either in the presence of both the witnesses or at least in the presence of one among them and the acknowledgment to the other witnesses. No such recital was included in Ext.B1 Will and hence relied on the decision rendered by this Court in *Ujjalabai v. Puthukkudy Bharathan and Others* (2022 (3) KHC 65). What is dealt with by this Court in that decision is with respect to the requirement to be complied with for a valid attestation of a testament. The relevant portion of the said judgment is extracted below for reference:

4. The Will should be attested atleast by two witnesses under Section 63(c) of Indian Succession Act. It further mandates that (i) the witnesses should have seen the affixture of signature or mark by the testator in the Will or had received a personal acknowledgment from the testator regarding his signature or

mark affixed and that (ii) the witnesses should have signed the Will in the presence of the testator. These are the two inseparable requirements to be satisfied in proof of due execution and cannot be brought under the purview of procedural law, but will form the essence of the requirement embodied under that provision and hence, a mere substantial compliance may not be sufficient to bring the matter within its sweep. Necessarily, the abovesaid mandate should reflect in the execution of the testament, a Will or Codicil and something should be there in the Will or testament regarding the compliance of abovesaid two statutory requirements. Hence, it is not permissible to introduce the said requirement at first in the court after the death of the testator unless there is something discernible from the document, the Will or testament regarding its compliance. That is really lacking in the instant case, wherein there is not even any mention with respect to the compliance of

the said requirements. Hence, it cannot be said that the Will was executed in accordance with the mandate under Section 63(c) of the Indian Succession Act.

The said decision shall not be misunderstood for a proposition that the Will should contain a statement regarding the compliance of the abovesaid two mandates incorporated under Section 63(c) of Indian Succession Act. But the compliance of the said requirement should reflect in the document and there should be something discernible from the document to that effect. In the instant case, one of the attesting witnesses stood as introducing witness to the Sub- Registrar and subscribed his signature over the document for that purpose and it was certified by the Sub-Registrar concerned. Necessarily, when one of the attesting witnesses introduced the testator before the Sub-Registrar and subscribed his signature for that purpose and certified by the Registrar, it would constitute a relevant factor discernible from the document showing the compliance of requirement of valid attestation, especially when the document contains two or more attesting witnesses. Further, the Will was not challenged for a long period of 21 years. Hence, the appeal fails, dismissed. No costs. Sd/- P.SOMARAJAN JUDGE rkr-15/11