2025:KER:62828

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

TUESDAY, THE 19TH DAY OF AUGUST 2025 / 28TH SRAVANA, 1947

FAO (RO) NO. 127 OF 2016

AGAINST THE ORDER DATED 23.7.2014 IN AS NO.77 OF 2011 OF SUB COURT, PERUMBAVOOR ARISING OUT OF THE ORDER DATED 29.3.2011 IN OS NO.113 OF 2009 OF MUNSIFF COURT, PERUMBAVOOR

APPELLANTS/RESPONDENTS/DEFENDANTS:

1 SAIBY
AGED 40 YEARS, W/O.JACOB, NEDUMAKUZHI, THURUTHI P.O., PUNNAYAM KARA, ASAMANNOOR VILLAGE, KUNNATHUNADU TALUK.

2 ELIYAMMA
AGED 75 YEARS, W/O.ISSAC, NEDUMAKUZHI, THURUTHI P.O., PUNNAYAM KARA, ASAMANNOOR VILLAGE, KUNNATHUNADU TALUK.

BY ADVS.
SRI.P.THOMAS GEEVERGHESE
SRI.TONY THOMAS (INCHIPARAMBIL)

RESPONDENT/APPELLANT/PLAINTIFF:

MARY
W/O.ELDHOSE, KOYAKKATTU HOUSE, VARAPPETTY KARA, VARAPPETTY VILLAGE, ERNAKULAM, PIN – 686 691

BY ADVS.
SMT.S.LEELALAKSHMI
SRI.G.RAJAGOPAL
SMT.N.RENJINEE DEVI

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR ADMISSION ON 29.07.2025, ALONG WITH FAO (RO).128/2016, THE COURT ON 19.08.2025 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE EASWARAN S.

TUESDAY, THE 19TH DAY OF AUGUST 2025 / 28TH SRAVANA, 1947

FAO (RO) NO. 128 OF 2016

AGAINST THE ORDER DATED 23.7.2014 IN AS NO.78 OF 2011 OF SUB COURT, PERUMBAVOOR ARISING OUT OF THE ORDER DATED 29.3.2011 IN OS NO.95 OF 2009 OF MUNSIFF COURT, PERUMBAVOOR

APPELLANTS/RESPONDENTS/PLAINTIFFS:

1 **SAIBY**
AGED 40 YEARS, W/O. JACOB,NEDUMAKUZHI, THURUTHI P.O.,PUNNAYAM KARA, ASAMANNOOR VILLAGE,KUNNATHUNADU TALUK.

2 **JESN**
AGED 14 YEARS (MINOR), D/O. JACOB PALLIPADAN,RESIDING AT NEDUVANKUZHI HOUSE,PUNNAYAM KARA, ASAMANNOOR VILLAGE,REPRESENTED BY HER FATHER JACOB, AGED 42 YEARS, S/O. BABY, PALLIPPADAN HOUSE,RESIDING AT NEDUVANKUZHI HOUSE, PUNNAYAM KARA, ASHAMANNOOR VILLAGE,KUNNATHUNADU TALUK.

3 **ELIYAMMA**
AGED 75 YEARS, W/O. ISSAC,NEDUMAKUZHI, PUNNAYAM KARA,ASAMANOOR VILLAGE, KUNNATHUNADU TALUK.

BY ADVS.
SRI.P.THOMAS GEEVERGHESE
SRI.TONY THOMAS (INCHIPARAMBIL)

RESPONDENTS/APPELLANTS/DEFENDANTS:

1 **MARY**
AGED 41, W/O. ELDHOSE,KOYAKKATTU HOUSE, VARAPPETTY KARA,VARAPPETTY VILLAGE,

ERNAKULAM, PIN – 686 691

2 ELDHOSE
AGED 45 YEARS, S/O. KURIAKOSE,KOYAKKATTU HOUSE, VARAPPETTY KARA,VARAPETTY VILLAGE, ERNAKULAM, PIN – 686 691

BY ADVS.
SMT.S.LEELALAKSHMI
SRI.G.RAJAGOPAL
SMT.N.RENJINEE DEVI

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR ADMISSION ON 29.07.2025, ALONG WITH FAO (RO).127/2016, THE COURT ON 19.08.2025 DELIVERED THE FOLLOWING:

“C.R”

EASWARAN S., J

FAO (RO) Nos.127 and 128 of 2016

Dated this the 19th day of August, 2025

J U D G M E N T

These appeals arise out of an order of remand passed by the Sub Court, Perumbavoor in A.S Nos.77/2011 and 78/2011 dated 23.07.2014. By the judgment impugned, the First Appellate Court set aside the judgment and decree of the Munsiff’s Court, Perumbavoor in O.S.Nos.113/2009 & 95/2009 dated 29.3.2011 and remanded the suit back for fresh consideration. In these appeals, certain intricate questions pertaining to the interpretation of Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 have been raised.

2. The brief facts necessary for the disposal of these appeals are as follows:-

O.S No.95/2009 was instituted by the appellants for a prohibitory injunction, restraining the defendants [respondents herein] from trespassing into the plaint schedule property, which they claimed as derived through a

Will executed by the 1st plaintiff's father, one Issac. The plaintiff in O.S No.113/2009 sought a prayer for declaration of title, recovery of possession, partition, and for a permanent prohibitory injunction. On appreciation of oral and documentary evidence, the trial court decreed O.S No.95/2009 and dismissed O.S No.113/2009. Aggrieved by the judgment and decree, the plaintiff in O.S No.113/2009 preferred two appeals, A.S Nos.77/2011 and 78/2011. The primary dispute involved in the suits is as regards the registered Will No.118/2007 dated 19.10.2007 [Ext.B5], executed by late Issac, the father of the 1st appellant. Based on the Will, the trial court dismissed the suit for declaration of title filed by the respondent herein and decreed the suit filed by the appellants for permanent prohibitory injunction. The First Appellate Court, however, took a view that the Advocate Commissioner has not identified the property and therefore, the trial court ought not to have decreed the suit filed by the respondent herein. It was further found that, when the Will was attempted to be proved, in terms of the mandate of Section 68 of the Indian Evidence Act, 1872, attesting witness did not speak about the second attesting witness who attested the Will and therefore, the mandate of Section 63(c) of the Indian Succession Act, 1925 is not complied with and therefore found that the Will is not proved.

Accordingly, remanded back the suit for a fresh trial, in accordance with law.

3. In these appeals, the appellants contend that, the order of remand is unwarranted, as it is nobody's case that, the Will was not proved in terms of Section 68 of the Indian Evidence Act, 1872. As regards the misdescription of property, it is contended that, the first appellate court did not notice Section 71 of the Indian Succession Act, 1925, and that, the identity of a property cannot be the basis for questioning the Will.

4. Heard Shri.P.Thomas Geeverghese, the learned counsel for the appellants and Shri.G.Rajagopal, the learned counsel for the respondents.

5. Shri.P.Thomas Geeverghese, the learned counsel for the appellants contended that in terms of the provisions contained in Section 68 of the Indian Evidence Act, 1872 the appellants are required to examine only one attesting witness and the mandate having been complied with, the Will stood proved and therefore the trial court rightly decreed the suit. In the memorandum of appeal, the respondent did not have a case that the Will was not proved because of the infirmity in the oral testimony of DW2, the attesting witness. The alleged misdescription, if any, would not render the Will void inasmuch as the provisions of Section 71 of the Indian Succession Act, 1925, would come to aid. In support of his contention,

relied on the decisions of the Hon'ble Supreme Court in **H.Venkatachala Iyengar v. B.N.Thimmajamma** [AIR 1959 SC 443] and **Shashi Kumar Banerjee v. Subodh Kumar Banerjee** [AIR 1964 SC 529] and **Ganesan (Dead) Through Legal Representatives v. Kalanjiam and others** [(2020) 11 SCC 715].

6. Per contra, Shri.G.Rajagopal, the learned counsel for the respondents, would contend that the basic requirement of Section 63 of the Indian Succession Act, 1925 is that the Will should be attested by two witnesses along with the testator. Read with Section 68 of the Indian Evidence Act, 1872 the attesting witness should not only speak about the factum of affixing the signature by the testator in his presence and that he should also speak about the other attesting witnesses. Since, the statutory requirements were not complied with, the First Appellate Court rightly found that the Will cannot be accepted in evidence and remanded the suits for fresh consideration. In support of his contention, relied on the decisions of the Hon'ble Supreme Court in **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Others** [(2009) 4 SCC 780], **Gopal Swaroop v. Krishna Murari Mangal and Others** [(2010) 14 SCC 266], **Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and others** [(2008) 15 SCC 365], **Rur Singh (D) Th. Lrs. and others v.**

Bachan Kaur [(2009) 11 SCC 1], **Janki Narayan Bhoir v. Narayan Namdeo Kadam** [(2003) 2 SCC 91] and **Benga Behera and another v. Braja Kishore Nanda and Others** [(2007) 9 SCC 728].

7. I have considered the rival submissions raised across the Bar, perused the judgments of the courts below and the records of the case.

8. On consideration of the rival submissions raised across the bar, this Court framed the following substantial questions of law:

> "**(i). When there is a misdescription of property bequeathed under the Will, whether it is a suspicious circumstance defeating the Will or it is a matter for construction under Section 78 of the Indian Succession Act.**
>
> **(ii). When an extent of property bequeathed under a Will is not available to the testator, shouldn't the court apply Principles of Ademption under Section 152 of the Indian Succession Act, or interpretation under Section 78 of the Act, instead of setting aside the Will?**
>
> **(iii). Whether non examination of second attesting witness is fatal to the proof of the Will?**
>
> **(iv). If no question about the second attesting witness is put to the attesting witness examined to prove the Will, can it not be inferred that second attestation was done in terms with principles stated in Devassykutty Vs Visalakshy Amma [2010(3)KLT 1010]?**
>
> **(v). When a suit is remanded for fresh trial, shouldn't the parties be given equal opportunity to adduce evidence to advance their respective case?**
>
> **(vi). Can the first appellate court introduce suspicious circumstances about a Will based on misdescription of property, which is neither pleaded nor proved before the trial court**?"

Thus, in the light of the substantial questions of law framed as above, this Court is called upon to address the question regarding the interpretation of Section 63(c) of the Indian Succession Act, 1925. The answer to the above question will ultimately determine whether the first appellate court was justified in setting aside the judgment of the trial court holding that the Will is not proved. It is pertinent to mention that, the respondent/defendant in her appeal did not have a case that the Will is not proved in terms of Section 63 of the Indian Succession Act, 1925. It is thus obvious that the first appellate court by itself formed an opinion regarding non-compliance of the provisions of Section 63(c) of the Indian Succession Act, 1925. Therefore, the issue to be addressed by this Court is, whether the propounder, while attempting to prove a Will, must satisfy the conditions under Section 63(c) of the Indian Succession Act, 1925.

9. The manner in which a Will is to be proved is laid down under Section 68 of the Indian Evidence Act, 1872 which reads as under:-

> **"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:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a

> Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

10. A bare reading of the aforesaid provision would show that, as soon as the propounder examines the attesting witness, the requirement of law is met. However, when we read Section 63(c) of the Indian Succession Act, 1925, it would appear that a Will should be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 63(c) of the Indian Succession Act, 1925 reads as under :

> **"63 Execution of unprivileged Wills.-**
> **xxx xxx xxx**
> **(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."**

11. The thrust of the argument of the learned counsel for the respondents is based on the decision of the Hon'ble Supreme Court in **Janki Narayan Bhoir v. Narayan Namdeo Kadam** [(2003) 2 SCC 91]. Paragraph 10 of the decision is extracted for reference:-

"10. S.68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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 an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of S.63 of the Succession Act with S.68 of the Evidence Act, it appears that a person propounding the Will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of S.63 of the Succession Act. It is true that S.68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in S.63. Although S.63 of the Succession Act requires that a Will has to be attested at least by two witnesses, S.68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, S.68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under S.63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of the clause (c) of S.63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in this evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the

> **formalities required under S.63 of the Succession Act. Where one attesting witness examined to prove the will under S.68 of the Evidence Act fails to prove the due execution of the Will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the Will by the other witness there will be deficiency in meeting the mandatory requirements of S.68 of the Evidence Act."**

12. The essence of the above decision is, while attempting to prove a Will, in terms of Section 68 of the Indian Evidence Act, 1872 the attesting witness, who is examined, should not only depose that, he has seen the testator affixing the signature but also should speak about the attestation by the 2nd attesting witness. While arriving at the aforesaid view, the Hon'ble Apex Court read Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Evidence Act together and found that, the effect of a combined reading of these two provisions would result in the above conclusion. Following this decision, the Hon'ble Supreme Court in other decisions consistently held that the requirement of law would be met only if the attesting witness, who is being examined to prove the Will, should speak about the presence of the other attesting witness also.

13. However, the view expressed by the Two Judge Bench decision of the Hon'ble Supreme Court in **Janki Narayan Bhoir** (supra) was not met with approval in **Ganesan (Dead) Through Legal Representatives v.**

Kalanjiam and others [(2020) 11 SCC 715]. Paragraph 5 of the decision is extracted hereunder:-

> "5. **The appeals raise a pure question of law with regard to the interpretation of Section 63(c) of the Act. The signature of the testator on the will is undisputed. Section 63(c) of the Succession Act requires an acknowledgment of execution by the testator followed by the attestation of the will in his presence. The provision gives certain alternatives and it is sufficient if conformity to one of the alternatives is proved. The acknowledgment may assume the form of express words or conduct or both, provided they unequivocally prove an acknowledgment on part of the testator. Where a testator asks a person to attest his will, it is a reasonable inference that he was admitting that the will had been executed by him. There is no express prescription in the statute that the testator must necessarily sign the will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the will simultaneously at the same time in presence of each other and the testator. Both the attesting witnesses deposed that the testator came to them individually with his own signed will, read it out to them after which they attested the Will."**

14. The primary reason for the Supreme Court to take a different view from that of **Janki Narayan Bhoir** (supra) is that, Section 63(c) of the Indian Succession Act, 1925 provides for alternatives and that, if the attesting witness deposed that, he has seen the testator sign the Will, that is sufficient compliance of Section 68 of the Indian Evidence Act is concerned and in turn requirements of Section 63(c) of the Indian Succession Act, 1925

is met. Pertinently, the Supreme Court did not notice the earlier view in **Janki Narayan Bhoir** (supra), which creates difficulties in the present case.

15. In **Dhanpat Vs Sheo Ram (deceased) Through Lrs and others [2020 (16) SCC 209],** the Supreme Court held that once the Will is proved in terms of Section 68 of the Indian Evidence Act, 1872, then the requirement of Section 63(c) of the Indian Succession Act, 1925 is met.

16. The learned counsel for the appellants would thus submit that, since the decisions of the Supreme Court in **Sheo Ram (Supra**) and **Ganesan (Dead) Through Legal Representatives (supra)** take a different view, the same being subsequent decisions, should be applied as the binding precedent under Article 141 of the Indian Constitution. However, the learned counsel for the respondents would point out that, when the Hon'ble Supreme Court rendered its decision in **Ganesan (Dead) Through Legal Representatives** (supra), it did not notice the earlier decision on the point, and hence, the decision in **Ganesan (Dead) Through Legal Representatives** (supra) cannot be considered as a good law.

17. Apparently, there is a serious conflict as regards the decisions of the Hon'ble Supreme Court, **Janki Narayan Bhoir** (supra) on one side and in **Sheo Ram** (supra) and **Ganesan (Dead) Through Legal Representatives** (supra) on the other side. However, one could say that, in

Ganesan (Dead) Through Legal Representatives (supra), the Hon'ble Supreme Court gave a different perspective to Section 63(c) of the Indian Succession Act, 1925 and held that the Section provides for alternatives, whereas in **Janki Narayan Bhoir** (supra), the Hon'ble Supreme Court did not consider the impact of Section 63(c) of the Indian Succession Act, 1925 in its entirety. However, in the said decision Section 63(c) of the Indian Succession Act was read along with Section 68 of the Indian Evidence Act, 1872. As far as **Sheo Ram** (supra) is concerned, the Supreme Court did notice the decision in **Janki Narayan Bhoir** (supra) and decided otherwise.

18. In light of the conflicting views, the question before the Court is which decision should be applied to the facts of the case. Should this Court apply the earlier decision in **Janki Narayan Bhoir** (supra) or should it apply **Ganesh (dead) through Legal Representatives** (Supra). Either way, it is likely to offend one of the decisions of the Supreme Court.

19. In **Sundeep Kumar Bafna Vs State of Maharastra & Anr [(2014) 16 SCC 623]**, the Supreme Court held that, if a co-equal bench of the Supreme Court renders a decision without noticing the earlier precedent on the point, then the binding precedent is the earlier decision and not the subsequent decision.

20. If tested in the light of the principles in **Sundeep Kumar Bafna(supra**) the decision in **Ganesh(dead) through L.R's (supra)** having failed to notice the earlier decision in Janaki Narayan Bhoir (supra) should not be treated as precedent. Having said so, can the High Court refuse to follow a binding precedent by the Supreme Court on the ground that the subsequent decision did not notice the earlier decisions on this point? What happens if a different perspective is given by the subsequent decision of the Supreme Court, which was not addressed by the earlier decisions? What happens if the High Court finds that, on appreciation of the decisions, the law declared in the subsequent decision is more appropriate to the facts of the case? These are certainly vexatious issues which require to be thread carefully by the Court because, either way, the decision of this Court may go contrary to the decisions of the Supreme Court, either at an earlier point of time or at a later point.

21. A Full Bench of this Court in **Raman Gopi Vs. Kunju Raman Uthaman [2011(4) KHC 9]** was called upon to decide the issue regarding the conflict of decisions of co-equal benches of the Supreme Court and it was held that in case of conflicting views taken in the decisions of two benches of equal strength of the Apex Court, the decision on the later point of time will prevail over the earlier one.

22. But again, the decision of the full bench may also not help the cause in view of the decision of the Supreme Court in Sundeep Kumar Bafna(supra). Hence, this Court needs to consider the cumulative decisions of the Supreme Court cited across the bar to find out the principle governing the attestation of the will under Section 63(c).

23. It is worthwhile to mention that in **Sheo Ram** (Supra) , the Supreme Court considering the scope of Section 63(c) of the Indian Succession Act, 1925 held that, the propounder is said to have satisfied the requirement of Section 63(c), if he meets the requirement of Section 68 of the Indian Evidence Act, 1872. In **Ganesh (dead) through Legal Representatives** (supra), the Supreme Court held that Section 63(c) speaks of alternatives and it is sufficient if any of the alternatives is proved.

24. The question again came to be addressed by the Supreme Court in **Gopal Krishan and others v. Daulat Ram and others** [(**2025) 2 SCC 804**], and it was held that once an attesting witness has seen the deceased affixed the signature or marked on the Will, that alone will ensure compliance of Section 63(c) of the Indian Succession Act, 1925. Paragraph 22 of the decision is extracted as under :-

> **“22. In the present case the testimony of DW1 is clear that he had seen the deceased affix his mark on the will. That alone would ensure compliance of Section 63(c).**

> **The part of the section that employs the term *"direction"* would come into play only when the attestor to the will would have to see some other person signing the will. Such signing would explicitly have to be in the presence and upon the direction of the testator**."

25. It is pertinent to note that the Supreme Court rendered the above decision after noticing the earlier decision in **Janki Narayan Bhoir** (supra). In the light of the above decision, any doubt surrounding the requirement of an attesting witness speaking about the presence of another attesting witness no longer survives. When we read the principles laid down by the Supreme Court in **Sheo Ram** (supra), **Ganesh (dead) through Legal Representatives** (supra) and **Gopal Krishnan** (supra) in cumulative, it can be safely concluded that the requirement of Section 63(c) is met, if the propounder examines one of the attesting witness who speaks about the testator affixing the signature in the Will and thus complying the requirements of Section 68 of the Indian Evidence Act. Going by the principles enunciated by the Supreme Court in the later decisions on the scope of Section 63(c) of the Indian Succession Act, 1925, this Court finds, it is bound to apply the later decision and not the earlier one.

26. In **Metapalli Lasum Bhai (Since dead) vs Metapalli Muthaih (D) By LR's [(2025) SCC Online SC 1488]**, the Supreme Court

held that if a Will is registered, the burden is on the party who denies its existence or that there were suspicious circumstances.

27. In the present case, no doubt the Will in question is a registered Will. It is indisputable that, the Will is attested by two attesting witnesses and one of them has clearly spoken about the testator affixing the signature. The plaintiff in OS No.113/2009 did not have a case that, it was bad for want of proper attestation under Section 63(c) of the Indian Succession Act, 1925. In fact, the specific case pleaded is that the Will is vitiated by undue influence. A reading of the oral testimony of the plaintiff, will show that she had no case of any undue influence or that the Will was bad for any reason. In fact, no plea regarding suspicious circumstances is raised. Hence, the scope of consideration of the appeals, if at all, was limited to examining the question as to whether the plaintiff had discharged the burden and to what extent the defendants were successful in proving the Will in terms of Section 68 of the Indian Evidence Act, 1872. That be so, the first appellate court went wrong in finding that since the attesting witness has not spoken about the presence of the 2nd attesting witness, the Will is not proved. While holding so, the first appellate court failed miserably to consider the fact that, under Section 63(c) of the Indian Succession Act, it is not the requirement of law that the two attestors should be present at the same time when the

testator signs the Will. If that be so, how can an attesting witness prove that, he had seen other attestor signing the Will, if the attestation was done at a different time? It is in this context, the decisions of the Supreme Court in **Ganesh (dead) through LRS** (supra) and in **Gopal Krishnan** (supra) assume significance.

28. Yet another infirmity pointed out in the finding of the first appellate court is that it thoroughly went wrong in holding that the identity of the property is not proved and hence the Will cannot take effect. A Will cannot be said to be invalid merely because there is a discrepancy in the description of the property. Section 78 of the Indian Succession Act, 1925 provides that, erroneous description of the subject must be rejected and the bequest should take effect. Section 78 of the Indian Succession Act reads as under:-

> "Section 78- **Rejection of erroneous particulars in description of subject**.- If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the Will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect."

29. Inconsistency, if any, in the description of the property will have to be reconciled to give effect to the intention of the testator. The entire exercise done by the first appellate court is nothing short, but to destroy the

Will executed by late Issac. The exercise undertaken cannot be given a stamp of approval by this Court. In case the courts find that, there is a misdescription of the property in the "Will", the extent of misdescription will have to be eschewed so as to give effect to the "Will". It is trite law that, Will being the last testament of the deceased, the same has to be given effect to and it is not for the court to conduct a roving enquiry as regards the validity of the Will. The endeavour of the courts should always be to give effect to the Will and not to render it as a void one. Unfortunately, the first appellate court did not notice these settled principles and on an erroneous assumption, held that the Will is not proved.

30. This Court cannot remain oblivious of the fact that in the appeal before the first appellate court, the respondent did not have a case that the Will was not proved in terms of Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. Therefore, this Court is of the considered view that the order of remand by the first appellate court is completely erroneous and unsustainable under law.

Accordingly, the appellants are entitled to succeed, and hence, the appeals are allowed, by answering the questions of law (i) to (iv) in favour of the appellants. The other questions of law are not answered in view of the above. The judgment dated 23.07.2014 in A.S Nos.77/2011 and 78/2011

on the files of Sub Court, Perumbavoor is set aside. Resultantly, the appeals shall stand restored to the files of the Sub Court, Perumbavoor. The Sub Court, Perumbavoor is directed to consider the appeals on merits, in accordance with law, as expeditiously as possible, at any rate, before the closure of the courts for the Christmas vacation. The parties are directed to appear before the Sub Court, Perumbavoor on 10.09.2025. Ordered accordingly.

Sd/-

EASWARAN S.
JUDGE

AMR