

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

THURSDAY, THE 4<sup>TH</sup> DAY OF JANUARY 2024 / 14TH POUSHA, 1945

OP(C) NO. 2174 OF 2023

ORDER DATED 26.09.2023 IN IA 4/2023 IN OS 98/2019 OF MUNSIF COURT,

PAYYANNUR

PETITIONER/PETITIONER/PLAINTIFF:

M.P.SUHARA  
AGED 64 YEARS, WIFE OF ABDUL FATHAH,  
MUNDAYATTU PURAYIL HOUSE, CHERUTHAZHAM AMSOM DESOM,  
P.O.MANDUR, PAYYANNUR TALUK, KANNUR DISTRICT, PIN - 670501  
BY ADVS.  
C.MURALIKRISHNAN (PAYYANUR)  
ABRAHAM GEORGE JACOB  
P.I.RAHEENA  
SHAHNA

RESPONDENT/RESPONDENT/DEFENDANT:

C.SUHARA  
AGED 52 YEARS, WIFE OF MUSTHAFAM, CHENGA HOUSE,  
KOROM AMSOM DESOM, THOTTAM KADAVU, PO.KANAYI, PAYYANNUR  
TALUK, KANNUR DISTRICT, PIN - 670307  
BY ADVS.  
K B ARUNKUMAR  
POOJA K.S. (K/000244/2021)

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 04.01.2024, THE  
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.JAYACHANDRAN, J.**

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**O.P.(C.) No.2174 of 2023**  
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**Dated this the 04<sup>th</sup> day of January, 2024**

**JUDGMENT**

The plaintiff in O.S. No.98/2019 of the Munsiff Court, Payyannur is the petitioner herein. He is aggrieved by Ext.P6 order, which refused an application to send the disputed agreement for opinion of an expert under Section 45 of the Evidence Act. The application was dismissed essentially for the reason that the same was preferred after commencement of the trial and when the matter was posted for further evidence, pursuant to examination of the plaintiff and one of the attesting witness (PW2).

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

3. Learned counsel for the respondent seriously opposed the relief sought for in this Original Petition on

the premise that the petitioner is trying to fish evidence, after his attempt to prove the agreement through PW2 miserably failed. PW2, an attesting witness to Ext.P1 agreement (based upon which the suit for money rests) categorically deposed that the defendant has subscribed his hands to a blank stamp paper. He also stated that he has not seen the defendant signing Ext.P1 agreement. It was emphatically pointed out by the learned counsel for the respondent that the signature contained in Ext.P1 was denied as early at the time of filing the written statement, pursuant to which, the plaintiff failed to take any steps under Section 45 of the Evidence Act. In this very belated stage, permitting such a course may not be in the interest of justice, is the submission made by the learned counsel for the respondent.

4. Having heard the learned counsel appearing for the parties, this Court is of the opinion that the plaintiff can be afforded an opportunity to prove his

document by taking a course to the remedy under Section 45 of the Evidence Act. This Court is of the opinion that the plaintiff cannot be found fault with for having chosen to prove Ext.P1 agreement through the attesting witness. It goes with saying that ocular evidence tendered by an attesting witness as regards the execution of the document, if reliable, stands at a far better footing when compared to the evidence sought to be adduced by taking course to Section 45 of the Evidence Act. But proof of execution through an attesting witness cannot be deemed or treated as the only remedy available to the plaintiff, which course, if adopted, will give primacy to the opinion of the attesting witness. The law cannot be that, once the attesting witness gives a version, all and sundry are bound by it. It is only upon exhausting a better remedy, that the plaintiff was compelled and constrained to avail a lesser remedy by way of Section 45. In the peculiar facts and circumstances, the delay cannot stand in the

way of availing the remedy under Section 45 of the Evidence Act. In the circumstances, Ext.P6 order cannot be sustained; the same is set aside.

5. To save the time for disposal of the suit, in which part of evidence had been let in, this Court is of the opinion that the disputed document need not be send to the Forensic Science Laboratory, Thiruvananthapuram, which may entail considerable delay. Instead, it will be open for the parties to chose a private expert, for which purpose, the petitioner will submit a list of three private experts before the court below. It will be open for the respondent as well to file a list of private experts, in case the respondent would choose to do so. The court below will appoint an appropriate expert for the purpose of comparison of the disputed document under Section 45 of the Evidence Act. Once the report of the expert is made available, the trial will be proceeded from the state where it is stopped. Ext.P4 application is allowed as indicated

above. Needless to say that the trial will stand stayed until the expert's report/opinion is made available. It is clarified that the expenses for the expert will necessarily be borne by the petitioner/plaintiff.

The original petition is disposed of as above.

**Sd/-**

**C. JAYACHANDRAN**

**JUDGE**

SKP/04-01

APPENDIX OF OP(C) 2174/2023

PETITIONER'S EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE AGREEMENT DATED 27/09/2017  
EXECUTED BY RESPONDENT IN FAVOUR OF PETITIONER

EXHIBIT P2 TRUE COPY OF THE PLAINT DATED 09/05/2019 FILED  
BY THE PETITIONER IN OS NO.98/2019 ON THE FILES  
THE COURT OF MUNSIF PAYYANUR

EXHIBIT P3 TRUE COPY OF THE WRITTEN STATEMENT DATED  
18/09/2019 FILED BY THE RESPONDENT IN OS  
NO.98/2019 ON THE FILES THE COURT OF MUNSIF  
PAYYANUR

EXHIBIT P4 TRUE COPY OF THE AFFIDAVIT AND PETITION DATED  
08/08/2023 IN IA.NO. 04/2023 IN OS.NO.98/2019  
FILED BY PETITIONER ON THE FILES THE COURT OF  
MUNSIF PAYYANUR

EXHIBIT P5 TRUE COPY OF THE COUNTER DATED 11/08/2013 FILED  
BY RESPONDENT IN IA. NO 04/2023

EXHIBIT P6 TRUE COPY OF THE ORDER DATED.26/09/2023 OF  
MUNSIF COURT, PAYYANUR IN IA.NO.04/2023 IN  
OA.NO.98/2019

RESPONDENT'S EXHIBITS:NIL

TRUE COPY

P.A. TO JUDGE