

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 17TH DAY OF MARCH 2015/26TH PHALGUNA, 1936

FAO (RO).No. 52 of 2015 ()

AS 347/2011 of II ADDL. DISTRICT COURT,PALAKKAD

APPELLANT/2ND RESPONDENT/2ND DEFENDANT:

SUKUMARAN
S/O. M.R.KUTTAN, MATTUMMAN VEEDU, KANHIKULAM
PALAKKAD TALUK.

BY ADV. SRI.RAJESH SIVARAMANKUTTY

RESPONDENTS/APPELLANTS/PLAINTIFFS/DEFENDANTS 3 TO 6:

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1. VIJAYALAKSHMI
W/O. K.GANGADHARAN, PANAMTHODIKA VEEDU, KAVILPAD AMSOM
PALAKKAD TALUK AND DISTRICT-678001.
 2. M.K.KRISHNAVENI
W/O. CHAMI, VALIYAKULANGARA VEEDU
KODUMTHIRAPPULLY AMSOM
PALAKKAD TALUK AND DISTRICT-678014.
 3. MURALIDHARAN
S/O. VARANI PADMAVATHI, AKKARAKKAD HOUSE
KADUKKAMKUNNAM, MALAMPUZHA, PALAKKAD TALUK-678651.
 4. DEVAN
S/O. VARANI PADMAVATHI, AKKARAKKAD HOUSE
KADUKKAMKUNNAM, MALAMPUZHA, PALAKKAD TALUK-678651.
 5. SUSHMA
D/O. VARANI PADMAVATHI, AKKARAKKAD HOUSE
KADUKKAMKUNNAM, MALAMPUZHA, PALAKKAD TALUK-678651.

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6. RAJANEESH
S/O. LATE RATHNAM, KOOTTAPURA VEEDU, KALUR AMSOM
PALAKKAD TALUK-678008.
7. RESHMA
D/O. LATE RATHNAM, KOOTTAPURA VEEDU, KALUR AMSOM
PALAKKAD TALUK-678008.
8. RAHUL
S/O. LATE RATHNAM, KOOTTAPURA VEEDU, KALUR AMSOM
PALAKKAD TALUK-678008.
9. K.K.RAJAN
S/O. KANDAN, KOOTTAPURA VEEDU, KALUR AMSOM
PALAKKAD TALUK-678008.

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR ADMISSION
ON 17-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

F.A.O.(R.O.) No.52 of 2015

Dated 17th March, 2015.

J U D G M E N T

The decision of the Court of the II Additional District Judge, Palakkad in A.S.No.347 of 2011 dated 8.12.2014, by which the suit O.S.No.377 of 2009 on the file of the Court of the Additional Subordinate Judge, Palakkad was remitted for fresh disposal, is under challenge in this appeal. The plaintiffs in the suit are the appellants.

2. O.S.No.377 of 2009 is a suit for injunction and damages. The plaint schedule items 1 to 4 properties belonged to late Kuttan and plaint schedule items 5 to 9 properties belonged to the first defendant. On 4.9.1989, Kuttan and the first defendant jointly executed a document styled as a Will, by which the plaint schedule properties were given to their daughters Padmavathy, Vijayalakshmi, Krishnaveni and

Ratnam. Ext.A1 is the certified copy of the said Will. As per Ext.A1 Will, a life interest was created in favour of Kuttan over the properties held by the first defendant and a life interest was created in favour of the first defendant over the properties held by Kuttan. Kuttan died on 9.4.1996. The case of the plaintiffs is that in the nature of Ext.A1 Will, after the death of Kuttan, the first defendant has no right to make any change in the disposition and she can only enjoy the life interest over the properties. According to them, at the instance of the second defendant, the first defendant had sold the trees in the plaint schedule properties for a sum of Rs.1,00,000/- and is attempting to sell the plaint schedule property.

3. The defendants contested the suit. According to them, on the death of Kuttan, the disposition in the Will in respect of the properties held by Kuttan took place and the first defendant is enjoying those properties on the basis of the life interest in her favour. It was also their case that the first defendant being the owner of plaint schedule items 5 to 9 properties, she is entitled to deal with the said properties in any

manner she likes.

4. Neither the plaintiffs nor the defendants adduced any oral evidence. It seems that the document dated 4.9.1989 was marked on consent as Ext.A1.

5. The trial court passed a decree of prohibitory injunction as prayed for by the plaintiffs in respect of plaint schedule items 1 to 4 properties. No relief was however granted to the plaintiffs in respect of plaint schedule items 5 to 9 properties. The claim for damages was also declined.

6. The plaintiffs challenged the decision of the trial court to the extent it declines relief to them in respect of plaint schedule items 5 to 9 properties. The defendants raised a Cross Objection in the appeal challenging the decision of the trial court to the extent it grants reliefs to the plaintiffs in respect of plaint schedule items 1 to 4 properties. The appellate court found that the execution of Ext.A1 Will has not been proved in the suit and consequently set aside the decision of the trial court and remitted the suit for fresh disposal after affording the plaintiffs an opportunity to prove the execution of

Ext.A1 Will. The plaintiffs are aggrieved by the decision of the appellate court and hence this appeal.

7. The learned counsel for the appellants contended that the appellate court ought not have interfered with the decision of the trial court as to the nature of Ext.A1 Will while remitting the suit for fresh disposal for the purpose of proving the execution of the Will.

8. As found by the appellate court, it is now settled that even in a case where the making of the Will is admitted, the same must be proved as provided for under Section 68 of the Indian Evidence Act, as otherwise, the court cannot use the same as evidence in the suit. It is beyond dispute that Ext.A1 Will has not been proved as provided for under Section 68 of the Indian Evidence Act. The question as to the nature of the Will arises only when the execution of the same is proved as provided for under Section 68 of the Evidence Act. Since the execution of Ext.A1 Will has not been proved in the suit, the trial court ought not have ventured to decide the nature of the Will. The lower appellate court, in the circumstances, is

justified in setting aside the decision of the trial court and remitting the suit for fresh disposal.

There is no merit in the appeal and the same is, accordingly, dismissed *in limine*.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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(true copy)