

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

FAO (RO).No. 212 of 2014 ()

AGAINST THE JUDGMENT IN AS 189/2011 of ADDL.D.C. & MACT,
NORTH PARAVUR, DATED 31-03-2014;

AGAINST THE JUDGMENT IN OS 159/2009 of MUNSIFF COURT,
NORTH PARAVUR, DATED 11-08-2011

APPELLANTS/RESPONDENTS/PLAINTIFFS:-

1. MURALEEDHARAN
S/O NARAYANA PILLAI, TRIDAPPALLY HOUSE
VALLUVALLY KARA, KOTTUVALLY VILLAGE, PARAVUR TALUK
NOW AT NO.43/2713, SRUTHY, SRM ROAD
ERNAKULAM

2. SYAMALA
W/O LATE MOHANKUMAR, TRIDAPPALLY HOUSE
VALLUVALLY KARA, KOTTUVALLY VILLAGE, PARAVUR TALUK
NOW AT 43/2713, SRUTHY, SRM ROAD
ERNAKULAM

3. KAVITHA VENUGOPAL
D/O LATE MOHANAKUMAR, TRIDAPPALLY HOSE
VALLUVALLY KARA, KOTTUVALLY VILLAGE, PARAVUR TALUK
NOW AT NO.43/2713, SRUTHY, SRM ROAD
ERNAKULAM

4. MANOJ KUMAR
TRIDAPPALLY HOSE, VALLUVALLY KARA, KOTTUVALLY VILLAGE
PARAVUR TALUK, NOW AT NO.43/2713, SRUTHY
SRM ROAD, ERNAKULAM

BY ADV. SRI.K.RAVEENDRAN

RESPONDENTS/PETITIONERS/DEFENDANTS:-

1. JALAJA MANI
W/O RAJEEV, KALAPPURACKAL PUTHENVEEDU, VALLUVALLY KARA
KOTTUVALLY VILLAGE
PARAVUR TALUK NOW AT KUNNATHU VEETIL
MANATHANA KARA, KANNUR DISTRICT.

2. SATHIDEVI
D/O GOPALAKRISHNA ELAYIDAM, TRIDAPPALLY VEETIL
KAVIL NADA, KALAPPURACKAL PUTHENVEEDU, VALLUVALLY KARA
KOTTUVALLY VILLAGE, PARAVUR TALUK.

-: 2 :-

3. RADHAKRISHNAN
S/O GOPALAKRISHNA ILAYIDAM
KALAPPURACKAL PUTHENVEEDU, VALLUVALLY KARA
KOTTUVALLY VILLAGE, PARAVUR TALUK, WORKING ABROAD
REPRESENTED BY HIS AUTHORISED AGENT AND BROTHER SREEKUMAR
S/O GOPALAKRISHNA ILAYIDAM, TRIDAPPALLY VEETIL
KAVIL NADA, KALAPPURACKAL PUTHENVEEDU, VALLUVALLY KARA
KOTTUVALLY VILLGAE, PARAVUR TALUK.

4. SREEKUMAR
S/O GOPALAKRISHNA ILAYIDAM, TRIDAPPALLY VEETIL
KAVIL NADA, KALAPPURACKAL PUTHENVEEDU, VALLUVALLY KARA
KOTTUVALLY VILLGAE, PARAVUR TALUK

R1,R4 BY ADV. SRI.P.VISWANATHAN
R1,R4 BY ADV. SRI.SUNIL N.SHENOI

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING
COME UP FOR ADMISSION ON 27-01-2015, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

Kvs/-

P.B.SURESH KUMAR, J.

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F.A.O.(R.O.).No.212 of 2014.
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Dated this the 27th day of January, 2015.

J U D G M E N T

The decision of the Court of the Additional District Judge, North Paravur in AS.No.189 of 2011, by which the suit OS.No.159 of 2009 on the file of the Court of the Munsiff, North Paravur was remanded for fresh consideration, is under challenge in this appeal. The plaintiffs in the suit are the appellants.

2. OS.No.159 of 2009 is a suit for partition. According to the plaintiffs, the plaint schedule property belonged to their tharawad and they are entitled to two out of six shares in the property. It is stated by the plaintiffs in the plaint that their mother Sujatha Amma had executed a will in respect of the plaint schedule property on 7.9.2001 in favour of the defendants 1, 2 and 4 and they are asserting title to the property based on the said will. According to them, since the property belonged to the tharawad, Sujatha Amma was not competent to execute the will relied on by the defendants in respect of the plaint schedule property. It is also their case that Sujatha Amma did not possess

steady and disposable state of mind at the time of the execution of the alleged will and therefore, at any rate, the defendants cannot claim title over the plaint schedule property to the exclusion of the plaintiffs.

3. The defendants filed written statement contending mainly that the plaint schedule property was bequeathed to defendants 1, 2 and 4 by Sujatha Amma as per registered will dated 7.9.2001 and that therefore, the plaintiffs have no right over the property.

4. A certified copy of the will relied on by the defendants was produced by the plaintiffs as Ext.A5. The original of the will was not produced by the defendants. Instead, they produced Ext.B14 letter from a bank which recites that the original of the will has been deposited with them.

5. The trial court found that without the original of the the will, the issue whether the will can be used in evidence or not cannot be decided and consequently, decreed the suit, holding that the defendants have not proved the will.

6. The defendants preferred A.S.No.189 of 2011 challenging the decision of the trial court. In the appeal, they have produced the original of the will along with an application

under Order 41 Rule 27 of the Code of Civil Procedure.

7. The appellate court noticed that the plaintiffs had though raised a contention that Sujatha Amma was not competent to execute Ext.A5 will, the trial court had not raised an issue on the competence of Sujatha Amma to execute Ext.A5 will. The appellate court also noticed that without the original of the will on record, the question as to whether the same can be used in evidence or not cannot be decided. In the aforesaid view of the matter, the appellate court remitted the suit to the trial court for fresh consideration based on the original of the will that was produced before the appellate court, after raising an issue as to the competence of Sujatha Amma to execute Ext.A5 will. It is aggrieved by the said decision of the appellate court, this appeal is preferred by the plaintiffs.

8. Heard the learned counsel for the appellants and the learned counsel for the respondents.

9. The learned counsel for the appellants contended that the plaint schedule property is a tharawad property of Sujatha Amma who is following the system of Marumakkathayam law and she is not competent to execute Ext.A5 will and that the appellate court should have considered the said issue and

decided the appeal finally.

10. I do not think that there is any merit in the contention raised by the learned counsel for the appellants. It is seen that the pleadings of the plaintiffs concerning the competency of Sujatha Amma to execute the will is vague and sketchy. It is on account of the said reason, the said issue was not considered by the trial court. The issue whether the property sought to be partitioned is the thrawad property of Sujatha Amma or not being a pure question of fact, which has not been considered by the trial court, the matter cannot be directed to be decided by the appellate court. The issue whether the will relied on by the defendants can be used as evidence in the suit would also assume relevance, if it is found that Sujatha Amma was competent to execute the will, as the defendants are claiming exclusive right over the property based on the said will. As noticed by the appellate court, the said issue was also not considered for want of the original of the will and the original will has since been produced. It is in the said circumstances, having regard to the facts and circumstances of the case, the appellate court took the view that the issue as to whether Sujatha Amma was competent to execute the will needs to be

considered by the trial court after raising an issue for the said purpose. In the facts and circumstances, the appellate court also thought it fit to direct the trial court to consider the question as to whether the will can be used as evidence in the case based on the original of the will that was produced before it. The view taken by the appellate court, on the facts of this case, cannot be held to be illegal.

11. There is, therefore, no merit in the appeal and the same is, accordingly dismissed. However, in the peculiar facts and circumstances of this case, I deem it appropriate to direct the trial court to dispose of the suit finally, as expeditiously as possible, at any rate within six months from today. The parties are directed to appear before the trial court on 27.2.2015.

Sd/-
P.B.SURESH KUMAR
(Judge)

Kvs/-

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PA TO JUDGE.