

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR**

**TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937**

**RSA.No. 668 of 2007**  
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**AS 35/2002 OF SUB COURT, THIRUVALLA DATED 29-11-2006.  
OS 742/1995 OF MUNSIFF COURT, THIRUVALLA DATED 27-09-2001.**  
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**APPELLANT(S)/APPELLANTS/DEFENDANTS 4, 5, 10 & 11:**  
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1. **AMMINI @ ALIYAMMA DAVID,  
AGED 56 YEARS, PARAKKALAYIL VEETIL,  
KURIYANNUR MURI, THOTTAPPUZHASSERY VILLAGE.**
2. **ANNAMMA, W/O.VARKEY, AGED 52 YEARS,  
PARAKKALAYIL VEETIL, KURIYANNUR MURI,  
THOTTAPPUZHASSERY VILLAGE.**
3. **P.S.RAJAN, PARAKKALAYIL HOUSE,  
KURIYANNUR MURI, THOTTAPPUZHASSERY VILLAGE.**
4. **P.S.ROY, PARAKKALAYIL HOUSE,  
KURIYANNUR MURI, THOTTAPPUZHASSERY VILLAGE.**
5. **PODIKUNJU, S/O.PAPPY, KALEECKAL HOUSE,  
KURIYANNUR MURI, THOTTAPPUZHASSERY VILLAGE.**
6. **SALI, W/O.PODIKUNJU, KALLECKAL HOUSE,  
KURIYANNUR MURI, THOTTAPPUZHASSERY VILLAGE.**

**BY ADV. SRI.N.N.SASI**

**RESPONDENT(S)/RESPONDENTS/PLAINTIFFS 2, 3/DEFENDANTS:**  
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1. **MARIYA KUTTY, D/O.YOHANNAN, PARAKKALAYIL VEETIL,  
KURIYANNORE MURI, THOTTAPPUZHASSERY VILLAGE.**
2. **PAULOSE, S/O.YOHANNAN, AGED 44 YEARS,  
PARAKKALAYIL VEETIL, KURIYANNURE MURI,  
THOTTAPPUZHASSERY VILLAGE.**
- \*3. **SAMUEL, S/O.YOHANNAN, AGED 50 YEARS,  
PARAKKALAYIL VEETIL, KURIYANNURE MURI,  
THOTTAPPUZHASSERY VILLAGE.(DIED)(LEGAL HEIRS RECORDED)**

RSA.No. 668 of 2007  
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4. ANNA, W/O.SAMUEL, PARAKKALAYIL VEETIL,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
5. THANKAMMA, D/O.SAMUEL, PARAKKALAYIL VEETIL,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
6. BABU, S/O.PAPPY, KALEECKAL HOUSE,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
7. LETHA, W/O.BABU, KALEECKAL HOUSE,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
8. JACOB, S/O.CHACKO, PARAKKALAYIL HOUSE,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
9. PONNAMMA, W/O.JACOB, PARAKKALAYIL HOUSE,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.
10. JOHNY, S/O.MARIYA, PARAKKALAYIL HOUSE,  
KURIYANNURE MURI, THOTTAPPUZHASSERY VILLAGE.

\*AS PER THE ORDER DATED 3.11.2015 VIDE MEMO C.F.4788/2014  
DATED 13.8.2014 THE 3RD RESPONDENT DIED AND RESPONDENTS  
4 AND 5 WHO ARE ALREADY IN THE PARTY ARRAY ARE RECORDED  
AS HIS LEGAL HEIRS.

R5 TO R10 BY ADV. SRI.R.SANTHOSH BABU  
R2 BY SRI.BECHU KURIAN THOMAS(SENIOR ADVOCATE)  
ADVS.SRI.ROSHEN.D.ALEXANDER

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD  
ON 03-11-2015, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

mbr/

**P.B.SURESH KUMAR, J.**

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**R.S.A.No.668 of 2007**  
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**Dated 3<sup>rd</sup> November, 2015.**

**J U D G M E N T**

Defendant No.4 and the legal representatives of defendant No.5 in a suit for declaration of title and injunction, both mandatory and prohibitory, are the appellants in this second appeal.

2. The plaint schedule item No.1 property, measuring 48 cents, belonged to Yohannan and Poulose as obtained by them by virtue of Ext.A1 sale deed. The plaintiffs are the successors of Poulose and the defendants are the successors of Yohannan. The case of the plaintiffs is that Yohannan and Poulose had equal rights in plaint schedule item No.1 property; that they partitioned the said property between them orally by which the southern 24 cents, described in plaint schedule item No.2 property was allotted to Poulose and the northern 24 cents, described in plaint schedule item No.3

property, was allotted to Yohannan and that the defendants are interfering with the title and possession of the plaintiffs over the plaint schedule item No.2 property. They have, therefore, claimed a decree declaring their title to plaint schedule item No.2 property. They also claimed a decree for fixation of the boundary separating the plaint schedule item No.2 property with the plaint schedule item No.3 property. They further claimed a decree of permanent prohibitory injunction restraining the defendants from causing obstructions to the peaceful enjoyment of the plaintiffs over the plaint schedule item No.2 property and a decree of mandatory injunction directing defendant No.5 to remove the plaint schedule item No.4 building constructed by him overlapping the plaint schedule item No.2 property.

3. Defendant No.4 filed a written statement and contested the suit. The remaining defendants remained ex parte. The contention of Defendant No.4 was that the plaint schedule item No.1 property was partitioned between Yohannan and Poulose as per Ext.B1 partition deed in the year

1104 ME itself by which the northern 36 cents of the plaintiff schedule item No.1 property was allotted to Yohannan and the remaining 12 cents was allotted to Poulose. According to defendant No.4 , pursuant to Ext.B1 partition deed, Yohannan executed Ext.B2 gift deed in favour of his children including the first defendant in respect of the 36 cents allotted to him as per Ext.B1 partition deed and the first defendant in turn sold 4 cents of property obtained by him as per Ext.B2 gift deed to the fourth defendant as per Ext.B3 sale deed. In other words, according to defendant No.4, since the suit is filed on the premise that the predecessors of the plaintiff had obtained 24 cents out of the property covered by Ext.A1 sale deed, the plaintiffs are not entitled to any relief in the suit.

4. Ext.B1 produced by defendant No.4 is a certified copy of the partition deed purported to have been executed between Poulose and Yohannan. Since the case of the plaintiffs is that Poulose and Yohannan had never executed any document to partition the property obtained by them together and since the defendants have not proved the execution of Ext.

B1 partition deed, the trial court accepted the case of the plaintiffs that there was an oral partition of the property between Poulose and Yohannan as contended by the plaintiffs and consequently decreed the suit as prayed for by the plaintiffs in accordance with Ext C2(a) plan prepared by the Advocate Commissioner in tune with the case set up by the plaintiffs. Defendant No.4 and the legal representatives of the fifth defendant have though taken up the matter in appeal, the appellate court confirmed the decision of the trial court. Hence this second appeal.

5. Heard the learned counsel for the appellants as also the learned counsel for the respondents.

6. As noticed above, the case of the plaintiffs is that Poulose and Yohannan partitioned the property purchased by them as per Ext.A1 sale deed orally by which the southern one half of the property was allotted to Poulose, and the northern one half was allotted to Yohannan and that they were holding the property thereafter, on that basis. The case of the defendants, on the other hand, is that Poulose and Yohannan

partitioned the property obtained by them as per Ext.A1 sale deed, by virtue of Ext.B1 partition deed in the year 1104 M.E. itself by which the southern 12 cents was allotted to Poulose and the northern 36 cents was allotted to Yohannan and they were holding the property thereafter on that basis. If the case of the defendants are accepted, the plaintiffs are not entitled to the decree sought for by them. As such, the only point arising for consideration in this second appeal is as to whether the defendants have established their case that there was a partition of the property covered by Ext.A1 sale deed between Poulose and Yohannan in the year 1104 M.E. as per Ext.B1 partition deed. As stated above, the document marked as Ext.B1 in the proceedings is a certified copy of the partition deed purported to have been executed between Poulose and Yohannan in 1104 M.E. In the light of the stand taken by the plaintiffs that there was only an oral partition of the property between Poulose and Yohannan, it was obligatory for the defendants to establish the execution of Ext.B1 partition deed. The crucial issue in the suit, in the circumstances, is as to

whether the defendants have established due execution of Ext.B1 partition deed. Production and marking of certified copy of a private document like partition deed does not dispense with the need for proof of execution of the document. Execution has to be proved in a manner known to law. Relying on the provisions contained in Section 67 of the Evidence Act, a Division Bench of the Madhya Pradesh High Court, in **Rekha Rana v. Ratnashree Jain** (AIR 2006 MP 107) held as follows :

“A private document cannot be used in evidence unless its execution is admitted by the party against whom it is intended to be used, or it is established by proof that it is duly executed. Due execution is proved by establishing that the signature (or mark) in token of execution was affixed to the document by the person who is stated to have executed the document. This is normally done either (i) by examining the executant of the document; or (ii) by examining a person in whose presence the signature/mark was affixed to the document; or (iii) by referring the document to a handwriting expert and examining such expert; or (iv) by examining a person acquainted with handwriting/signature of the person who is supposed to have written/signed the document; or (v) by requesting the court to compare the signature of the executant in the document with some admitted signature of the person shown as executant; or (vi) by proving admission by the person who is said to have signed the document, that he signed it.”

It is thus evident that the execution of Ext.B1 partition deed has not been proved by the defendants. However, a perusal of the judgment of the trial court does not indicate that an issue has been framed for trial as regards the execution of Ext.B1 partition deed. The question, therefore, is as to whether the courts below were justified in decreeing the suit holding that the defendants have not established their case, without framing an issue as regards the execution of Ext.B1 partition deed. According to me, in the light of the pleadings of the parties, it was obligatory for the trial court to frame an issue as regards the execution of Ext.B1 partition deed so as to enable the parties to adduce evidence in the matter. Since such a course was not adopted by the trial court, I deem it appropriate to set aside the impugned decisions and remit the suit for fresh disposal after framing an issue as to the execution of Ext.B1 partition deed. Further, Ext.B1 partition deed relied on by the defendants is a document executed about 85 years ago, in the year 1104 M.E. Ext.B2 gift deed produced by the defendants would indicate that the same is a document executed by

Yohannan on the strength of Ext.B1 partition deed in the year 1122 M.E. Likewise, Ext.B3 sale deed executed by the first defendant in favour of the fourth defendant would indicate that the same was executed on the strength of Ext.B2 gift deed in the year 1993. Ext.C1 report filed by the Advocate Commissioner in the suit indicates that the properties are not enjoyed by the parties as contended by the plaintiffs and that buildings have been put up by the successors of Yohannan overlapping the southern one half portion of the property covered by Ext.A1 sale deed. Exts.B1 to B3 are registered instruments. The suit was filed only in the year 1995. Till 1995, the plaintiffs have not raised any objections concerning the said documents. True, their case as regards the said documents is that they were not aware of the said transactions. In the said circumstances, interests of justice also demands that the suit shall be tried afresh, after framing an issue as to the execution of Ext.B1 partition deed.

In the result, the second appeal is allowed, the impugned judgments are set aside and the suit O.S.No.742 of

1995 on the file of the Munsiff Court, Thiruvalla is remitted for fresh disposal after framing an issue as regards the execution of Ext.B1 partition deed. All the interlocutory applications in the appeal are closed.

Sd/-

**P.B.SURESH KUMAR, JUDGE.**

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(true copy)