

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC  
&  
THE HONOURABLE SMT. JUSTICE P.V.ASHA

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

RFA.No. 54 of 2008

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AGAINST THE JUDGMENT IN OS 112/2005 of ADDL.SUB COURT, THALASSERY  
DATED 6-08-2007

APPELLANTS/DEFENDANTS:

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1. KARACHAN VEETIL MARIYAM, W/O.MUHAMMEDKUNHI HAJI,  
MADAYI AMSOM BAZAR, MUTTOM P.O.  
VENGARA, KANNUR.
2. KARACHAN VEETIL SAHUL HAMEED, S/O.  
MUHAMMED KUNHI HAJI, MADAYI AMSOM BAZAR,  
MUTTOM P.O.VENGARA, KANNUR.
3. KARACHAN VEETIL HUSSAIN, S/O. MUHAMMED  
KUNHI HAJI, MADAYI AMSOM BAZAR,  
MUTTOM P.O.VENGARA, KANNUR.

BY ADV. SRI.MILLU DANDAPANI

RESPONDENTS/PLAINTIFF:

1. ALIMA BEEVI, W/O. MUHAMMEDKUNHI HAJI,  
AGED 53 YEARS, HOUSE WIFE, ALIMA MANZIL  
NEAR MASJID, KANNOTHUMCHAL, KANNUR-6  
PRESENTLY R/AT BLK 237, CHOA CHUKANG CENTRAL 09-57  
SINGAPORE-680 237, REP.BY P.A.HOLDER, C.K.JAYAKUMAR  
S/O KRISHNAN, KRISHNA NIVAS, TALAP, KANNUR 2.
2. FATHIMAH BIBI, D/O. MUHAMMEDKUNHI HAJI,  
AGED 33, ALIMA MANZIL, NEAR MASJID  
KANNOTHUMCHAL, KANNUR-6, PRESENTLY R/AT BLK 237  
CHOA CHUKANG, CENTRAL 09-57, SINGAPORE-680 237  
REP.BY P.A., HOLDER, C.K.JAYA KUMAR  
S/O. KRISHNAN, KRISHNA NIVAS, TALAP, KANNUR 2.
3. AHISA BEVI, D/O. MUHAMMED KUNHI HAJI,  
AGED 31 YEARS, ALIMA MANZIL, NEAR MASJID  
KANNOTHUMCHAL, KANNUR-6, PRESENTLY R/AT BLK 237  
CHOA CHUKANG CENTRAL 09-57, SINGAPORE-680 237  
REP.BY P/A HOLDER, C.K.JAYA KUMAR,  
S/O. KRISHNAN, KRISHNA NIVAS, TALAP, KANNUR 2.
4. MOHAMMED ALI, S/O. MUHAMMEDKUNHI HAJI,  
AGED 27 YEARS, ALIMA MANZIL, NEAR MASJID  
KANNOTHUMCHAL, KANNUR-6, PRESENTLY R/AT BLK 237  
CHOA CHUKANG CENTRAL 09-57, SINGAPORE-680 237  
REP.BY P/A HOLDER, C.K.JAYA KUMAR, S/O. KRISHN

5. ABDULLAH, S/O. MUHAMMED KUNHI HAJI,  
AGED 23 YRS, ALIMA MANZIL, NEAR MASJID  
KANNOOTHUMCHAL, KANNUR-6, PRESENTLY R/AT BLK 237  
CHOA CHUKANG CENTRAL 09-57, SINGAPORE-680 237  
REP.BY P/A HOLDER, C.K.JAYA KUMAR,  
S/O. KRISHNAN, KRISHNA NIVAS, TALAP, KANNUR 2.
6. MUSA, S/O. MUHAMMEDKUNHI HAJI, AGED 19,  
ALIMA MANZIL, NEAR MASJID, KANNOOTHUMCHAL  
KANNUR-6, PRESENTLY R/AT BLK 237, CHOA CHUKANG  
CENTRAL 09-57, SINGAPORE-680 237, REP. BY P/A  
HOLDER, C.K.JAYA KUMAR, S/O. KRISHNAN  
KRISHNA

R,R1 TO 6 BY ADV. SRI.P.U.SHAILAJAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON  
16-10-2015, ALONG WITH FAO.Nos. 40 of 2009, 164 2009 AND OPC  
1995/13, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

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R.F.A.No.54 of 2008,  
F.A.O.Nos.40 & 164 of 2009 and  
O.P(C).No.1995 of 2013  
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Dated this the 16<sup>th</sup> day of October, 2015

JUDGMENT

Antony Dominic, J.

1. These appeals and the Original Petition arise from the proceedings in O.S.112/05 on the file of the Additional Sub Court, Thalassery. The said suit was filed by the respondents in RFA.54/08 for partition of A to D schedule properties. The preliminary decree passed in the suit on 6.8.2007 is challenged in RFA.54/08 by the defendants in the suit. FAO.40/09 is filed by the defendants in the suit, challenging the order dated 16.9.2008 in IA.1098/08, by which, the second appellant in the RFA was authorised to collect rent in respect of B, C and D schedule properties and deposit the same in court. Subsequently, in IA.1383/09 in IA.1093/08, which was filed by the defendants in the suit, the court passed order dated 7.4.2009, recalling the order authorising the second appellant to collect the rent. It is this order which is challenged by the appellants in the RFA and in FAO.164/09.

2.O.P(C).1995/13 is filed by the second appellant in the RFA, seeking a direction to the Sub Court, Kannur to which the proceedings were transferred in the meanwhile, to expedite orders in IA.148/08 in O.S.112/05, where he sought for proceedings against the respondents under section 195 of the Cr.PC. Since the issues are connected, the cases were listed together and were also heard together.

3.The main controversy between the parties revolves round RFA.54/08 filed by the defendants in OS.112/05 challenging the preliminary decree for partition. The suit in question was filed by the respondents in the appeal, contending that they are the wife and children of late Sri.Muhammed Kunhi Haji, who died on 13.6.2002. According to them, the properties which are scheduled as A to D in the plaint are partible and they are entitled to share in those properties. It was their case that though they demanded partition, the same was not agreeable to the appellants, who are also another wife and children of the deceased and that therefore, the suit was filed.

4.The plaintiffs were residents of Singapore where Sri.Haji was carrying on certain business activities. Therefore, they appointed power of attorney holder, a copy of which is Ext.A1, and based on the strength of that power of attorney, the suit was filed.

5.In the written statement filed, the appellants disputed the status of the plaintiffs as wife and children of the deceased and according to them, deceased Haji had not even married the first plaintiff nor are the remaining plaintiffs the children of the deceased. They also contended that Ext.A1 power of attorney was not a genuine document, legally executed, to be relied on to maintain a suit for partition.

6.However, evidence was not let in by both sides and based on Exts.A1 to A19 produced by the plaintiffs, preliminary decree was passed to partition of the property in the manner as stated therein. It is this preliminary decree which is challenged in RFA.54/09.

7.The main contention raised by the learned senior counsel appearing for the appellants in RFA.54/08 is that Ext.A1 power of attorney is a document notarised in Singapore and that in the absence of a notification issued under section 14 of the Notaries Act, 1952, the said power of attorney could not have been relied on by the court. In support of this contention, learned senior counsel relied on the judgment of the Calcutta High Court in the matter of *Rei Agro Ltd. and Others* [AIR 2015 Calcutta 54].

8.Yet another contention raised was that the marriage between the first plaintiff and the deceased was not proved by any acceptable evidence. Therefore, according to the senior counsel, the preliminary decree for partition is unsustainable and ought to be interfered with.

9.This contention was refuted by the learned counsel appearing for the respondents who made reference to the evidence on record and the pleadings in the case.

10. We have considered the submissions made. The first contention raised is that Ext.A1 power of attorney was inadmissible in evidence to maintain the plaint. As we have already stated, this contention was raised on the strength of section 14 of the Notaries Act. Before we refer to the statutory provision, it is profitable to make reference to Ext.A1. Ext.A1 is a power of attorney executed by the plaintiffs on 13.6.2003 at Singapore and is attested by the Assistant Consul Officer, High Commissioner of India, Singapore. In other words, Ext.A1 is not a notarised power of attorney. Section 85 of the Evidence Act provides that the court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated. This, therefore, means that Ext.A1 power of attorney executed before the Indian Consul or Vice-consul or the representative of the Central Government is entitled to be presumed as so executed and authenticated. However, in respect of the power

of attorney notarised in a country outside India, presumption as available under section 85 will come into play only if the requirements of section 14 of the Notaries Act, which provide that if the Central Government is satisfied that by law or practice of any country or place outside India, the notarial acts done by notaries within India are recognised for all or any limited purposes in that country or place, the Central Government may, by notification in the official Gazette, declare that the notarial acts lawfully done by notaries within such country or place shall be recognized within India for all purposes, or as the case may be, for such limited purposes as may be specified in the notification.

11. In so far as the judgment of the Calcutta High Court, relied on by the learned senior counsel for the appellant is concerned, that was a case where reliance was placed on a power of attorney notarised in Singapore which was rightly declined to be acted upon by the High Court for the absence of a notification under section 14 of the Notaries Act.

12. In so far as this case is concerned, first of all, the power of attorney is not a notarised one and therefore, section 14 of the Notaries Act has no place and secondly, it being a power of attorney attested in terms of section 85 of the Evidence Act, is entitled to the presumption as provided therein. In such a situation, if the appellants wanted to challenge the power of attorney, it was up to them to let in evidence which they did not do. Such being the case, we cannot find fault with the trial court in relying on Ext.A1 power of attorney and render its preliminary decree on that basis.

13. The second contention raised by the learned counsel was one disputing the status of the first plaintiff as the wife and the other plaintiffs as the children of the deceased. In so far as this aspect of the matter is concerned, first of all, in Ext.A11 reply notice, appellants did not have such a case. Secondly, Ext.A12 marriage certificate shows that the deceased had married the first plaintiff in Singapore. Thirdly, Exts.A14 to A19 passports of the plaintiffs show the deceased as the husband of the

first plaintiff and father of the others. Similarly, in Exts.A4 to A9 title deeds in respect of C and D scheduled properties, the first respondent is shown as the wife of the deceased. While the plaintiffs have produced this documentary evidence, appellants, as we have already mentioned, have not even chosen to mount the box or produce any documents contradicting the currency of this evidence. Therefore, this contention also cannot be accepted. These are the two contentions raised impugning the preliminary decree passed by the trial court and for the aforesaid reasons, we are unable to accept the contentions raised.

14.FAO.40/09 is filed against the order passed in IA.1093/08. That order was recalled by order in IA.1383/09, against which, FAO.164/09 is filed. Reading of these orders show that it was on account of the non-compliance of the order in IA.1093/08 that order was passed in IA.1383/09. These orders were passed as early as on 16.9.2008 and 7.4.2009 and were not stayed by this Court. Having gone through these

orders and in the light of the facts as stated above, we see no reason to interfere with these orders also.

15.O.P(C).1995/13 is filed by the second appellant seeking a direction to the Sub Court, Kannur, to which the proceedings now stands transferred, to pass expeditious orders in IA.48/08. The report obtained from that court shows that the IA is posted along with the final decree proceedings. Since the IA is pending and since we are told that evidence had already been recorded in the IA, we need only state that it is up to that court to pass orders in that matter. There shall be a direction to that effect.

In the aforesaid circumstances, the appeals are dismissed and the OP is disposed of.

Sd/-  
ANTONY DOMINIC, Judge.

Sd/-  
P.V.ASHA, Judge.

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