

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 14TH DAY OF JULY 2015/23RD ASHADHA, 1937

OP(C).No. 1820 of 2014 (O)

OS 158/1995 of MUSNIFF COURT, ADOOR

PETITIONERS :

- 1. SHANKARA KURUP,
HARISHREE THONDALI THARA PUTHENVEEDU(THATTUPURA)
THENGAMAM MURI, PALLICKAL VILLAGE, ADOOR TALUK,
PATHANAMTHITTA DISTRICT.**
- 2. N.SREEDHARA KURUP,
THENGAMAM MURI, PALLICKAL VILLAGE, ADOOR TALUK,
DISTRICT.**
- 3. PRASSANAKUMARIAMMA,
W/O.VASUDEVAKURUP, ABHILASH BHAVANAM,
PADINJATTUKIZHAKKE MURI, SOORANADU NORTH VILLAGE,
KUNNATHOOR TALUK, KOLLAM DISTRICT.**
- 4. ABHILASH.V.,
S/O.VASUDEVAKURUP, ABHILASH, PADINJATTUKIZHAKKE MURI,
SOORANAD NORTH VILLAGE, KUNNATHOOR TALUK,
KOLLAM DISTRICT.**
- 5. ANEESH,
S/O.VASUDEVAKURUP, ABHILASH, MURI,
SOORANADU NORTH VILLAGE, KUNNATHOOR TALUK,
KOLLAM DISTRICT.**

**BY ADVS.SRI.ABRAHAM SAMSON
SMT.LOVELY SAMSON**

RESPONDENT/RESPONDENT/PLAINTIFF:

**SINDHU, W/O.AJAYAN, PLAMTHOTTATHIL HOUSE,
MUDIYOORKONAMM MURI
PANDALAM VILLAGE, ADUR TALUK
PATHANAMTHITTA DISTRICT-689501.**

R1 BY ADV. SRI.K.SASIKUMAR

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 14-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

bp

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1: COPY OF THE JUDGMENT OF THE HIGH COURT, KERALA, IN
R.S.A.1145/2006
- EXT.P2: COPY OF THE FINAL DECREE APPLICATION NO.I.A.1126 IN O.S.158/95
OF THE MUNSIFF'S COURT,ADOOR
- EXT.P3: COPY OF OBJECTION IN I.A.1126 IN O.S.158/05 OF THE MUNSIFF'S
COURT,ADOOR.
- EXT.P4: COPY OF THE I.A.1588/12 IN O.S.158/1995 OF MUNSIFF'S
COURT,ADOOR.
- EXT.P5: COPY OF THE I.A.1587/12 IN O.S.158/1995 OF MUNSIFF'S
COURT,ADOOR.
- EXT.P6: COPY OF THE I.A.1589/12 IN O.S.158/95 OF MUNSIFF'S COURT,ADOOR.
- EXT.P7: COPY OF THE ORDER IN I.A.1587/12,I.A.1588/12,I.A.1589/12 IN
O.S.158/95 OF MUNSIFF'S COURT,ADOOR.

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.S. TO JUDGE

bp

B. KEMAL PASHA, J.

.....
O.P.(C) No. 1820 of 2014
.....

Dated this the 14th day of July, 2015

J U D G M E N T

A preliminary decree has been passed in a suit for partition. It ultimately resulted in a Regular Second Appeal before this Court. The preliminary decree has been finalised through Ext.P1 judgment in RSA No. 1145 of 2006, wherein it was held as follows:

“Plaint schedule property is available for partition. It shall be divided into three equal shares. Two such shares shall be allotted to the plaintiff. The deceased third defendant is entitled to the remaining one share. The question to whom that share will devolve is left open

to be decided. Cost of the suit shall come out of the estate.”

It seems that this Court has left open the question with regard to the devolution of the 1/3rd share, to which the deceased 3rd defendant was entitled to.

2. Heard the learned counsel for the petitioners and the learned counsel for the respondent, who is the plaintiff in the suit.

3. According to the plaintiff, while the second appeal was pending, a partition deed was executed between the plaintiff and the deceased 3rd defendant, who was then alive, and as per the partition deed an extent of 50 cents was allotted to the share of the 3rd defendant. Out of that 50 cents, she had disposed of 10 cents of property to strangers and with regard to the remaining 40 cents, she had allegedly executed a Will bequeathing that 40 cents to the plaintiff.

4. The alleged partition deed as well as the execution of the Will by the 3rd defendant is being challenged by the

petitioners herein. According to them, they were not made known with regard to the execution of such a partition deed or Will.

5. Whatever it is, the partition deed cannot be taken up now as the same was not acted upon by this Court, while this Court was dealing with the second appeal. The execution of such a partition deed was not brought to the notice of this Court, even at the time of passing the judgment in the RSA. As per the judgment in the Second Appeal, which stands unchallenged, the partition deed cannot have any existence at all, and the same has to be treated as a *non-est* in the eye of law. The parties have to go by the decision in the RSA.

6. In such a case, if at all there is a Will executed by the deceased 3rd defendant that has to be proved in accordance with law, as contemplated under Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. The petitioners, who are the remaining legal

representatives of the estate of the 3rd defendant, wanted to get themselves impleaded in the final decree proceedings for which Ext.P4 IA was filed before the court below. They filed Ext.P5 application before the court below for passing a further preliminary decree regarding the devolution of the share of the deceased 3rd defendant. Ext.P6 application seeking an order of temporary injunction was also filed.

7. It seems that the court below has passed Ext.P7 common order on the said IAs. The court below has relied on the Will even without proof of such a Will. The court below has mercilessly thrown away the claims forwarded by the petitioners, without proof of the Will. Ext.P7 order is, *per se*, illegal, irregular and improper and is liable to be set aside.

In the result, this Original Petition is allowed and Ext.P7 order is set aside. The court below shall reconsider the aforesaid IAs, after deciding as to who are the legal representatives of the deceased 3rd defendant. The court

below shall consider that such a partition deed being relied on by the plaintiff is not in existence. The Will propounded by the plaintiff has to be proved in accordance with law. Then only the court below can enter a finding as to who are the legal representatives of the deceased 3rd defendant in respect of her property. After entering into a finding to that effect, the court below shall dispose of the IAs.

Sd/- B.KEMAL PASHA, JUDGE

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[True copy]

P.S. to Judge