

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 4TH DAY OF DECEMBER 2015/13TH AGRAHAYANA, 1937

RSA.No. 1196 of 2015

**AS 72/2013 OF 1ST ADDITIONAL DISTRICT COURT, THRISSUR DATED 09-09-2015
OS 435/2010 OF MUNSIF COURT, WADAKKANCHERRY DATED 28-02-2013**

APPELLANT(S)/APPELLANT/PLAINTIFF:

**PRABHAVATHY, AGED 49 YEARS,
D/O.KOLARYKARTHYAYANI AMMA, W/O.PRABHAKARAN,
CHOONDAL VILLAGE, THOOVANOORDESOM, THALAPPILLY THALUK.**

**BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SRI.K.R.ARUN KRISHNAN**

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

- 1. K.KRISHNANUNNY, AGED 60 YEARS,
S/O.KOLARIKUNCHIYAMMA, CHOONDAL VILLAGE, THOOVANURDESOM,
THALAPPILLY THALUK 680001.**
- 2. VENUGOPALAN, AGED 55 YEARS,
S/O.KOLARIMEENAKSHYAMMA, CHOONDAL VILLAGE,
THOOVANURDESOM, THALAPPILLY THALUK 680001.**
- 3. KARTHYAYANI AMMA, AGED 80 YEARS,
D/O.KOLARI JANAKYAMMA, THEKKEKKARA HOUSE, KACHERIPPADY,
VAILATHOOR 680001.**
- 4. VIJAYAN, AGED 58 YEARS,
S/O.MEENAKSHYAMMA, DWARAKA HOUSE, MARAD VILLAGE
& DESOM, ERNAKULAM DISTRICT 680001.**
- 5. SANTHA KUMARY, AGED 50 YEARS,
KAIPRAVEETIL, AGATHIYOOR VILLAGE, AKKIKKAVU DESOM,
THALAPPILLY THALUK 680001.**
- 6. PREMEVATHY, AGED 46 YEARS,
W/O.KRISHNA NIVASIL PREMAVATHY, H.NO.36/561,
3RD PULA STREET, SELAM CORPORATION & DISTRICT 680001.**

PJ

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7. SATHEESHKUMAR, AGED 67 YEARS,
S/O.KIZHAKKOOTVEETIL KUNCHUKUTTY AMMA,
ALLOORU VILLAGE & DESOM, THALAPPILLY THALUK 680001.

8. SAJISHA, AGED 30 YEARS,
W/O.CHATHANATHSAJEEV, CHOWANNUUR VILLAGE,
MARATHAMKODUDESOM, THALAPPILLY THALUK- 680001.

9. SREEJITH, AGED 28 YEARS,
S/O.KIZHAKKOOT VEETIL SATHEESH KUMAR,
ALLOORU VILLAGE & DESOM, THALAPPILLY THALUK 680001.

R1-R6,R8-R9 BY ADVS. SRI.T.M.SUNIL
SRI.GEORGE KURUVILLA(ALAPPUZHA)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 04-12-2015, ALONG WITH RSA. 1197/2015, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

PJ

P.B.SURESH KUMAR, J.

R.S.A. Nos.1196 & 1197 of 2015

Dated 4th December, 2015.

J U D G M E N T

The plaintiff in a suit for injunction is the appellant in these second appeals.

2. The suit property belonged to Lakshmikutty Amma, the sister of the maternal grandmother of the plaintiff. According to the plaintiff, she was residing with Lakshmikutty Amma in the house situated in the plaint schedule property and that the defendants are attempting to evict her from the plaint schedule property and the building therein, by force. The defendants resisted the suit. The contention taken by the defendants is that Lakshmikutty Amma executed Ext.B4 will, as per the terms of which the suit property devolved on them exclusively. According to the defendants, the plaintiff is residing in the building in the suit property as permitted by her mother, who is the third defendant. Defendants 5 to 9 in the

suit have also raised a counter claim seeking a decree of mandatory injunction directing the plaintiff to surrender the building in the suit property to the defendants. The trial court accepted the case set up by the defendants and dismissed the suit. In the light of the findings rendered by the trial court for dismissing the suit, the counter claim preferred by defendants 5 to 9 was allowed. Two appeals were preferred against the decision of the trial court by the plaintiff. The appellate court, on a re-appraisal of the materials on record, confirmed the decision of the trial court and dismissed the appeals. The plaintiff, who is aggrieved by the concurrent decisions against her, has come up in these second appeals.

3. The learned counsel for the appellant contended that the execution of Ext.B4 will relied on by the defendants has not been proved, as provided for under Section 68 of the Indian Evidence Act as also Section 63(c) of the Indian Succession Act. He also contended that the finding of the courts below that the plaintiff is in permissive occupation of the building is incorrect and unsustainable. According to the learned counsel, the

plaintiff is in exclusive possession of the suit property and therefore, even if what is stated by the defendants is correct, a suit for recovery of possession would have been the appropriate remedy. In support of the contention that the plaintiff is in possession of the property, the learned counsel also pointed out that DW1 has admitted in his evidence that the plaintiff is residing with Lakshmikutty Amma in the house situated in the plaint schedule property from the year 1970.

4. The question as to whether the plaintiff is in possession of the suit property is a pure question of fact. The courts below found that the plaintiff is not in possession of the suit property, but only in permissive occupation. This finding on a question of fact rendered concurrently by the courts below cannot be challenged in a second appeal filed under Section 100 of the Code of Civil Procedure. That apart, merely for the reason that the plaintiff was residing with Lakshmikutty Amma in the house situated in the plaint schedule property from the year 1970 onwards, it cannot be said that she is in possession of the property, especially when the plaintiff was only a minor

girl aged 12 years during 1970.

5. Coming to the contention raised as to the execution of Ext.B4 will, the argument raised by the learned counsel for the appellant is that one of the attestors to Ext.B4 will who was examined as DW3 has deposed only that he has seen the testator signing the document and that he has put his signature as an attesor in the document before the testator. According to the learned counsel, there is nothing on record to indicate that the other attesor to the document has attested the will, as provided for under Section 63(c) of the Indian Succession Act. In other words, the contention is that there is no evidence to indicate that the other attesting witness has seen the testator putting his signature in the document and that he has put his signature in the document in the presence of the testator. It is clarified in Section 63(c) of the Indian Succession Act itself that it shall not be necessary that more than one witness be present at the same time. In other words, it is not necessary that both the attestors should witness the testator signing the document. The attestors are authorised to

attest the will based on the personal acknowledgment of the testator concerning his/her signature. The chief examination of DW3 was in the form of proof affidavit. In the proof affidavit, it is categorically stated by DW3 that he has seen the other attesting witness putting his signature in the presence of the testator. It is thus evident that the defendants have established that the execution of Ext.B4 will is in accordance with Section 63(c) of the Indian Succession Act. There is, therefore, no merit in this contention also. The second appeals, in the circumstances, are dismissed in limine.

6. The learned counsel for the appellant, alternatively, prayed for a reasonable time to surrender vacant possession of the building in the plaint schedule property. Having regard to the close relationship between the parties and having regard to the fact that the plaintiff is residing for quite some time in the building, I deem it appropriate to grant the plaintiff time upto 31.5.2016 to vacate the building on condition that the plaintiff shall file an affidavit unconditionally undertaking to surrender the building in the suit property to the

defendants before the said date and it is ordered accordingly. The affidavit as directed shall be filed before the execution court within two weeks from the date of receipt of a copy of the judgment. All the interlocutory applications in the appeals are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgs

(true copy)