

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT.

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 27TH DAY OF MARCH 2015/6TH CHAITHRA, 1937

RSA.No. 1223 of 2014 ()

AS 11/2010 of DISTRICT COURT, MANJERI.

OS 107/2007 of SUB COURT, MANJERI

APPELLANT(S)/1ST RESPONDENT/PLAINTIFF:

PANTHAKKALATHIL RADHAMANI AGED 56 YEARS
W/O.LATE PANNIKKOTT VEETIL PRABHAKARAN
VELLAYOOR AMSOM AND DESOM, NILAMBUR TALUK.

BY ADVS.SRI.T.KRISHNAN UNNI (SR.)
SRI.VINOD RAVINDRANATH
SRI.SAJU.S.A
SMT.MEENA.A.
SRI.K.C.KIRAN

RESPONDENT(S)/APPELLANT & RESPONDENTS 2 TO 4/DEFENDANTS 1 TO 4:

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1. CHEENIYAMPURATH SARADAKUTTY, AGED 58 YEARS,
W/O.PANNIKKOTT GOVINDAN KUTTY NAIR, MANALODI
NILAMBUR AMSOM & DESOM, NILAMBUR TALUK, PIN 679330.
 2. HARIKRISHNAN, AGED 33 YEARS
S/O.LATE PANNIKKOTT VEETIL PRABHAKARAN
EDATHUMKUNNU PUTHAN VEEDU, MANIYANKODE AMSOM
KALPATTA TALUK, WAYANAD DISTRICT.
 3. SUBHASREE, AGED 31 YEARS
D/O.LATE PANNIKKOTT VEETIL PRABHAKARAN
EDATHUMKUNNU PUTHAN VEEDU, MANIYANKODE AMSOM
KALPATTA TALUK, WAYANAD DISTRICT.

4. PANNIKKOTT VEETIL GOVINDAN KUTTY, AGED 69 YEARS

S/O.LATE JANAKI AMMA, NILAMBUR AMSOM, DESOM MANALODY
NILAMBUR TALUK, PIN 679330.

R1 BY ADV. SRI.P.B.KRISHNAN (CAVEATOR FOR R1)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 27-03-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

R.S.A. No.1223 of 2014

Dated 27th March, 2015.

J U D G M E N T

The plaintiff in O.S.No.107 of 2007 on the file of the Court of the Subordinate Judge, Manjeri is the appellant.

2. O.S.No.107 of 2007 is a suit for partition. The plaint schedule property belonged to one Prabhakaran Nair. He is no more. The plaintiff is the second wife of Prabhakaran Nair. Defendants 1 and 2 are the children of Prabhakaran Nair in his first wife. The third defendant is the brother of Prabhakaran Nair and the fourth defendant is the wife of the third defendant. The case of the plaintiff is that she is entitled to 1/3 share in the plaint schedule property. The defendants 1 and 2 contended that Prabhakaran Nair had executed Ext.B1 will on 15.4.1994 by which the plaint schedule property was bequeathed to the second defendant and therefore, the plaintiff has no right in the property. They have also contended that on the strength of Ext.B1 will, the plaint schedule property was sold by defendants 1 and 2 to the fourth defendant as per

Ext.A4 sale deed.

3. The trial court decreed the suit holding that Ext.B1 is not a genuine document. The fourth defendant challenged the decision of the trial court in appeal. The appellate court, on an elaborate consideration of the entire materials on record, found that Ext.B1 is a genuine document and dismissed the suit. The plaintiff is aggrieved by the decision of the appellate court and hence this Second Appeal.

4. The following are the substantial questions of law raised for decision in the Second Appeal.

- “i. Has the court below applied the correct procedure to decide the question of genuineness of Ext.B1 will?
- ii. Is the court below justified in ignoring the subsequent conduct of the partition as evident from Ext.A5 while deciding the proof of execution of the alleged will?
- iii. Is the Extt.B1 satisfies the legal requirements of Section 63 of the Indian Succession Act and S.68 of Indian Evidence Act?”

5. Heard the learned counsel for the appellant and the learned counsel for the first respondent, who appeared through caveat. Certified copies of the relevant documents were also made available to me by the parties at the time of

hearing.

6. The learned counsel for the appellant contended that the execution of Ext.B1 will has not been proved as provided for under Section 68 of the Indian Evidence Act, 1972 and Section 63 of the Indian Succession Act. She has also contended that Ext.A5 sale deed executed by the parties in relation to another property held by deceased Prabhakaran Nair subsequent to the execution of Ext.B1 will would show that Ext.B1 will is not genuine.

7. As regards the execution of Ext.B1 will, the contention of the learned counsel for the appellant is that DW2, who was examined to prove the will as an attesting witness, did not say that he has seen the testator putting his signature on the will in his presence, as required under Section 63 of the Indian Succession Act. It has come out in evidence that Prabhakaran Nair was an employee in the Co-operative Department of the State Government. DW2 was also an employee of the said department. In the chief affidavit filed by DW2, it is categorically stated by him that he had worked with

deceased Prabhakaran Nair for years and that he had signed as a witness to the will written by him. He has also stated that Prabhakaran Nair has put his signature in the will in his presence and thereafter, he has signed as a witness to the document in the presence of Prabhakaran Nair. This evidence of DW2 is not discredited in cross examination. The learned counsel for the appellant has relied on a statement made by DW2 in cross examination that when he went to the house where Prabhakaran Nair was residing at the relevant time, Prabhakaran Nair gave him the will and asked him to sign on the same and he has put his signature as directed by him. Based on the statement of DW2, it was argued that DW2 has not seen Prabhakaran Nair putting his signature in the will and therefore, the execution of the will is not in accordance with the requirements of Section 63 of the Indian Succession Act. As pointed out earlier, DW2 has categorically stated in the chief affidavit that he has seen Prabhakaran Nair putting his signature in the will and he has put his signature in the document as a witness in the presence of Prabhakaran Nair.

The portion of the evidence of DW2 relied on by the learned counsel for the appellant as referred to above is the evidence tendered by him in answer to a specific question put to him. The cross examination of DW2 does not indicate that any question was put to DW2 as to whether he has witnessed Prabhakaran Nair putting his signature on the will. There was also no suggestion to DW2 that he has not seen Prabhakaran Nair putting his signature on the will. As such, there is no substance in the argument of the learned counsel for the appellant that the execution of Ext.B1 will was not in accordance with the provision contained in Section 63 of the Indian Succession Act.

8. Deceased Prabhakaran Nair had another property at the time of his death. As per Ext.B1 will, the said property was given to the daughter of Prabhakaran Nair. Ext.B1 will contains a specific recital to the effect that the said property shall be sold and the proceeds shall be used for the marriage of his daughter, the second defendant. Ext.A5 is the document by which that property was sold to a stranger.

Ext.A5 sale deed has been executed by defendants 1 and 2, the children of the deceased along with the plaintiff, the second wife of the deceased. The argument advanced by the learned counsel for the appellant based on Ext.A5 sale deed is that had there been a will as claimed by the defendants, a document in the nature of Ext.A5 would not have been executed. In other words, according to the learned counsel, the property covered by Ext.A5 sale deed could have been sold by the second defendant herself on the strength of Ext.B1 will. In this context, it is seen that when the first defendant gave evidence as DW1, a specific question was put to him as to the reason why the plaintiff had also joined with them to execute Ext.A5 sale deed. To the said question, DW1 has explained that the said property was sold for the purpose of meeting the marriage expenses of the second defendant and the document was prepared by the purchaser of the property in the aforesaid fashion and since they had no other source to raise the marriage expenses at that point of time, they signed Ext.A5 document along with the plaintiff. The lower appellate court accepted the said

explanation offered by the first defendant and held that merely for the reason that a document in the nature of Ext.A5 was executed, it cannot be held that Ext.B1 will is not genuine. I concur with the view taken by the lower appellate court. The argument advanced on the strength of Ext.A5 sale deed thus fails.

In the circumstances, there is no merit in the Second Appeal and the same is, accordingly, dismissed in limine.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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