IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

WEDNESDAY, THE 11TH DAY OF JULY 2018 / 20TH ASHADHA, 1940

RSA.No. 163 of 2007 C

AGAINST THE JUDGMENT, DATED 6.4.2001, IN AS NO.59/1998 OF THE SUB COURT, NEDUMANGAD.

AGAINST THE JUDGMENT AND DECREE, DATED 15.1.1998, IN OS NO.88/1996 OF THE ADDL. MUNSIFF'S COURT, NEDUMANGAD.

APPELLANT/1ST RESPONDENT/PLAINTIFF:

RUDRAYANI DEVAKI, (DIED)
KUZHIVILAKATHU VEEDU, ERUTHUMMOOLA MURI,
PEROORKADA VILLAGE.
(LEGAL HEIRS IMPLEADED AS ADDL. APPELLANTS 2 TO 4)

ADDITIONAL APPELLANTS:

2. S.SANTHA KUMAR,
PULLUVILAKATHU PUTHEN VEEDU, PEROORKADA,
THIRUVANANTHAPURAM - 695 005.

3. MALATHY S., D/O.RUDRAYANI DEVAKI,
PULLUVILAKATHU PUTHEN VEEDU, PEROORKADA,
THIRUVANANTHAPURAM - 695 005.

4. SUNITHA VENUGOPAL, D/O.RUDRAYANI DEVAKI,
PULLUVILAKATHU PUTHEN VEEDU, PEROORKADA,
THIRUVANANTHAPURAM - 695 005.

THE LEGAL HEIRS OF DECEASED SOLE APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 2 TO 4 AS PER ORDER DATED 28.3.2017 IN I.A. NO.737 OF 2017.

BY ADVS.SRI.PIRAPPANCODE V.S.SUDHIR
SRI.JELSON J. EDAMPADAM

RESPONDENTS/APPELLANT & RESPONDENTS 2 AND 3/DEFENDANTS 3, 1 & 2:

1. A.RAJESWARI, D/O.AMMU,
PERUNALLIVILA VEEDU, CHELLAMCODE MURI,
VATTAPPARA VILLAGE, VENCODE P.O., NEDUMANGAD TALUK,
THIRUVANANTHAPURAM DISTRICT.

2. R.VERONICA,
MARIYA NAGAR, CHENTHIPOOR, CHELLAMCODE MURI,
VATTAPARA VILLAGE, NEDUMANGAD TALUK.

3. C.NELSON @ BABI,
CHENTHIPOOR, CHELLANCODE MURI, VATTAPARA VILLAGE,
NEDUMANGAD TALUK, THIRUVANANTHAPURAM DISTRICT.

R1 BY ADV. SRI.THIRUMALA P.K.MANI
R2 & R3 BY ADVS. SRI.R.S.KALKURA
SRI.M.S.KALESH
SRI.HARISH GOPINATH
SRI.V.VINAY MENON
SRI.KIRAN SANKAR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11.07.2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

P.Somarajan, J.

R.S.A. No.163 of 2007 (C)

Dated this the 11th day of July, 2018

JUDGMENT

Against the decree and judgment of the first appellate court (Sub Court, Nedumangad) in A.S.No.59 of 1998, dated 6.4.2001, reversing the judgment and decree in O.S.No.88 of 1996 of the Munsiff's Court, Nedumangad, dated 15.1.1998, the plaintiff came up with this appeal. The suit was for declaration of title of plaint 'A' schedule property, recovery of possession of 'B' schedule being part of 'A' schedule and for cancellation of Ext.A4 sale deed alleged to have been executed by defendant No.3 in favour of defendant No.1.

2. Both the parties are claiming their respective title under a parental document of partition, exhibited as A2, dated 13.7.1978, scheduled as 'E' and 'G' schedule in that document. The property allotted to the share of one Asok Kumar and

Lalitha is having an extent of 6.5 cents ('G' schedule) and the property allotted to the share of defendant No.3 is having an extent of 6.5 cents ('E' schedule). On 19.12.1978, defendant No.3 sold her 6.5 cents of property to one Vanajakshi. Later on, it was purchased by the plaintiff along with the property allotted to the share of Asok Kumar and Lalitha ('G' schedule in Ext.A2 partition deed) and thereby obtained 13 cents. The cause of action for the suit has arisen when defendant No.3 executed another sale deed, exhibited as A4, on 24.1.1996 in favour of defendant No.1 with respect to the very same property. It is also alleged that subsequent to the execution of Ext.A4 sale deed the defendants trespassed into plaint 'B' schedule property and reduced the same into their possession. Hence the suit for declaration and recovery of possession of the trespassed area.

3. The trial court, after the issuance of a survey commission, decreed the suit. It was taken up in appeal by defendant No.3 and the first appellate court reversed the

finding of the trial court and dismissed the suit holding that execution of Ext.A3 sale deed was disputed and denied by defendant No.3 and hence there is failure to prove due execution of the said document and transfer of title over the property. It was also found that defendant No.3 has subsequently transferred the property to defendant No.1 by executing Ext.A4 sale deed on 24.1.1996. Based on the said finding, the decree of the trial court was reversed and the suit was dismissed by the first appellate court. Aggrieved by the said reversal of the decree and judgment of the trial court by the first appellate court, the plaintiff came up with this second appeal.

4. The dispute is with respect to the execution of Ext.A3 registered sale deed dated 19.12.1978. Both parties are claiming their respective title over their respective properties based on Ext.A2 partition deed of the year 1978. It was submitted by the learned counsel for the respondents/defendants that since execution of Ext.A3

registered sale deed is in dispute it has to be proved in accordance with the mandate under Section 68 of the Evidence Act. It was further submitted that production of the original/certified copy of the sale deed would not itself amount to proof of execution of the said document and the person who is seeking benefit under the document should prove the same as mandated under Section 68 of the Evidence Act. It was also submitted that when execution of the document was disputed by the person by whom it purports to have been executed, it has to be proved in accordance with the mandate under Section 68 of the Evidence Act by summoning at least one of the attesting witnesses or by complying with the requirement mandated thereunder.

6. Section 68 of the Evidence Act is extracted below for reference:

> "**68. Proof of execution of document required by law to be attested**.-- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been

called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

(emphasis supplied)

7. The expression "the person by whom it purports to have been executed" engrafted under the proviso to Section 68 stands for a denial of execution of the document by the person who purports to have been executed the same 'in a suit brought by that person'. The further expression "specifically denied" should be understood as the denial of execution of document specifically by the person by whom it purports to have been executed, in a suit or proceeding initiated by him. It is available only in a suit or proceeding initiated by the person by whom it purports to have been executed. In other words, (1) there

should be a specific denial of execution of document by the person by whom it purports to have been executed, and (2) it has been raised by that person in a suit or proceeding initiated by him for that purpose. Unless there is a suit or counter claim or proceeding either filed or initiated or brought into existence by that person, there cannot be any requirement of compliance of mandate as envisaged in the main body of Section 68 of the Indian Evidence Act. Proviso to Section 68 of the said Act is an exception to its main body and a further exception carved out in the proviso avoiding the application of the proviso when there is specific denial of execution by the person by whom it purports to have been executed. In all other cases of execution of documents required by law to be attested, except a will or codicil, there is no requirement of compliance of mandate as envisaged in the main body of Section 68 of the Indian Evidence Act for its proof. A mere challenge by the executant/the person who purported to have been executed the document alone is not sufficient to bring the matter within the exception to the proviso to Section 68 of the Indian Evidence

Act, though he is in the party array of the suit either as a defendant or as a co-defendant unless there is a relief sought by him challenging its execution. The fact that the executant (defendant No.3) is in the party array of the suit alone will not bring the document within the purview of the exception carved out of the proviso to Section 68 of the Evidence Act and hence, the proviso to Section 68 alone would come into play without its exception and hence, there is no need or necessity for summoning or examining any of the attesting witnesses to prove the document.

8. No suit or counter claim or proceeding was admittedly initiated by defendant No.3, the person who purports to have executed Ext.A3 sale deed dated 19.12.1978. The production of the original of the said document would satisfy the requirement of proof of its execution. Necessarily, the subsequent execution of another deed of conveyance by defendant No.3 with respect to the same property in favour of defendant No.1 is without any authority, right, title or interest

over the property and hence the same is not binding on the rights of the plaintiff over the plaint schedule property. The plaintiff can very well ignore the same without seeking a remedy by way of setting aside the document or declaration but it may be a clog on its title to the property in future and hence the relief sought for by the plaintiff has to be granted by setting aside Ext.A4 sale deed. The decree passed by the first appellate court reversing the judgment and decree of the lower court hence liable to be set aside.

9. Another ground was also raised by the learned counsel for the defendants disputing the location of the property in Ext.C1 mahazar and Ext.C1(a) plan. It is submitted by the learned counsel for the respondents that one property is lying on the south-eastern corner and the other one is lying on the north-eastern corner of a large extent of one acre 93 cents. But the commissioner who visited the property located both plaint 'E' and 'G' schedule as a single compact plot without separating the same. Going by Ext.C1(a) plan prepared by the

commissioner, it is clear that these two properties were located as a single compact plot without any separation. The respective description of 'G' and 'E' schedule would show that these two properties would take the eastern part of a large extent of one acre 93 cents. There is no intervening property and hence it is perfectly in tune with the description given in both the title deeds as well as the parental document Ext.A2. The trial court has accepted the abovesaid plan and decreed the suit.

In the result, the second appeal is allowed. The decree and judgment of the first appellate court is hereby set aside. The decree and judgment passed by the trial court is restored. No costs.

Sd/-
P. Somarajan
Judge

ahz/