

IN THE HIGH COURT OF KERALA AT ERNAKULAM
Present:

The Honourable Mr. Justice K. E. Paripoornan
Monday, 8th day of July, 1985/17th Ashadha, 1907.

S.A.No. 17 of 1980.C.

A.S.No. 75 of 1976 of the Sub Court, Attingal.
C.S.No. 229 of 1971 of the Munsiff's Court, Varkala.

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APPELLANTS:- Appellants:- Defendants 3 and 7

1. Raman Unnithan Balakrishnan Unnithan,
Vakkayil Veedu, having also
Puthuvalvila Puthen Veedu, Vettiyar,
Navaikulam desom and village.
2. Kesavan Unnithan Balakrishna Pillai,
Kaliyilil Veedu, Vettiyara,
Navaikulam Desom, do. Village.

By Advs. M/s. P. Sukumeran Nair &
A. K. Chinnan.

RESPONDENTS:- Respondents:- Plaintiff and Defendants 1, 2 and
4 to 6

1. Kochukunjamma Thenkamma, Vakkayil Veedu,
having also Puthuvalvila Puthen Veedu,
Vettiyara, Navaikulam Desom and Village.
2. Kunchamma Kochukunjamma, do. do.
3. Raman Unnithan Raghevan Unnithan of do. do.
4. Raman Unnithan Menikantan Unnithan of do. do.
5. Kochukunjamma Chellamma of do.
6. Kochukunjamma Sumathyamma of do.

By Advs. M/s. V. Vyasani Poti & N. Sagathan.

This Second Appeal having been heard on 8-7-1985,

the court on the same day delivered the following:-

the plaint schedule property on 19-10-1971. The documents aforesaid are invalid. The defendants have no right over the plaint property. The plaintiff instituted the suit for declaration of her title and possession in respect of the plaint property and for putting up the southern boundary of the same. A permanent injunction restraining the 7th defendant from trespassing into the plaint schedule property was also prayed for. Recovery of possession was also prayed for in case the 7th defendant happens to take forcible possession of the plaint property. Defendants 2, 3 and 7 contested the suit. Execution of Ext. A1 Will was denied. It was attacked as a fabricated document. Raman Unnithan had no dispositive mind on the date of Exhibit A1. He was incompetent to execute any will at that time. By Ext. B1 settlement deed it was provided that the properties which are not allotted to anybody therein will be shared by the plaintiff and defendants 1 to 6 equally after the death of Raman Unnithan. That provision will prevail. Thereafter, Raman Unnithan was incompetent to execute Ext. A1 Will. Ext. B6 partition deed executed after the demise of Raman Unnithan in pursuance to which parties are in possession of the properties and Ext. B3 sale deed dated 19.10.1971 was executed in favour of the 7th defendant should prevail. The 7th defendant is in possession of the entire 14 cents. He is a bona fide purchaser for value. The suit should be dismissed.

2) The trial court found that Ext.A1 will be genuine and valid and that the plaintiff is entitled to get a declaration of title on the strength of Ext.A1 and to recover possession of the plaint schedule property from the 7th defendant. This was concurred by the lower appellate court. Some modifications regarding the permanent injunction granted against the 7th defendant were made by the lower appellate court. The declaration regarding plaintiff's title and recovery of possession of the plaint schedule property from the 7th defendant, ordered by the trial court, was confirmed. The lower appellate court also held that the plaintiff can recover mesne profits from the 7th defendant at the rate of Rs.30/- per annum from the date of suit till recovery of possession. Defendants 3 and 7 have come up in Second Appeal.

3) The following three questions of law were formulated as substantial questions of law arising for consideration in the Second Appeal:

- (i) Whether the due execution of a Will can be proved without the production of the original Will even if the conditions in Section 65 of the Evidence Act are satisfied and secondary evidence is admissible.
- (ii) Whether on a proper interpretation of Ext.B1 settlement deed the finding that the suit property was not disposed of by the executant under Ext.B1 is legal and proper.

114) Whether on the facts and in the circumstances of the case the finding that the plaintiff has title over the suit property is legal and proper.

4) I heard counsel for the appellants,

Mr. S. Sukumaran Iyer, and counsel for the respondents,

Mr. V. Vyasani Peti. The main point stressed was that secondary evidence of the Will dated 12.8.1958 (Ext. A1)

should not have been allowed. It was also contended

that Ext. A1 was not properly proved. On going through

the relevant pleadings and the evidence in the case,

I am unable to accept this submission. It is true

that the original Will of Raman Unnithan dated

12.8.1958 was not produced. Ext. A1 is only a certified

copy of the Will. The certified copy of the Will

(Ext. A1) was produced by the plaintiff and marked

through PW2. The only objection taken by the defence

was that he was not competent to prove the Will.

The plaintiff stated in the replication that the

original of Ext. A1 was with the 3rd defendant, one

of the brothers. Later she understood that the Will

was with the 1st defendant, her mother. She filed

I.A. 1242 of 1972 to direct the 1st defendant to

produce the original Will. The 1st defendant did not

produce the original Will in court. The plaintiff

took steps to direct the Sub Registrar concerned to

produce the original available in the Registration

Department. Ext. A1, the office copy of the Will was

produced by PW1, the Head Clerk. Ext.X2, Thumb
impression register was also proved by him. Pws 2 and
3 are the attestors to the original Will. They proved
the will. It is evident from the above that Ext.A1,
certified copy of the registered document, was produced
and marked by PW2 and the only objection was that he
was not competent to prove the same. The attestors,
Pws 2 and 3, proved due execution of Ext.A1 Will.
The plaintiff took steps to direct the 1st defendant,
who had the custody of the original, to produce the
same. She did not do so. Exts.X1 and X2 are the
relevant originals available in the office of the
Sub Registry relating to Ext.A1. PW3, the 3rd defen-
dant, categorically stated that on father's death
all the records are in the possession of the 1st
defendant. In these circumstances, I have no doubt
that the plaintiff was justified in producing and
relying on Ext.A1 copy of the Will of Ramasamiathan
dated 12.8.1935. The secondary evidence of the Will
was properly admitted by the courts below. Section 65
of the Evidence Act is clearly attracted. In this
view of the matter it cannot be said either that the
secondary evidence of the Will should not have been
permitted or that due execution of the Will has not
been proved in this case. Ext.A1 Will has been properly
and duly proved. The courts below were justified in
placing reliance on Ext.A1.

5) Appellants' counsel feebly contended that the suit property was disposed of by Exhibit A and so Ext.A1 is incompetent. The relevant recitals are extracted in para 7 of the judgment of the lower appellate court. It is evident that the plaint property is not dealt with in Ext.B1, nor was purpo to be dealt with. I am of the view that the proper dealt with in Ext.A1 were not dealt with and were not the subject matter of Ext.B1 settlement deed.

6) No other point was raised in the Second Appeal. The judgment and decree of the lower appellate court are affirmed. The Second appeal is without merit. It is dismissed with costs.

8th July, 1985.

Sd/- K.S.Paripoornan, Judge.

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(Asst. Registrar)