

IN THE COURT OF THE PRINCIPAL SUBORDINATE JUDGE, PALAKKAD
Present: Sri.Anup.A.B., Principal Sub Judge.

Thursday, the 13th day of April, 2023
23rd day of Chaithra, 1945 S.E

ORIGINAL SUIT NO:12/2017

Plaintiff :-

Krishnakumar S/o Late Ramachandra Menon, aged 58 years, Giri Kunj, 5B/102, New Mhada Goregaon, East Mumbai.

-Vs-

Defendants :-

1. Visalakshy Amma(Died), W/o Late K.P.Ramachandra Menon, Punartham, Sreekurumbakavu, Thathamangalam, Chittur.
(D1 died, statement filed by plaintiff on 07.02.2018)
2. Jalaja D/o Late K.P.Ramachandra Menon, aged 57 years, Gokulam Manjalur, Ethannur, Alathur.
3. Prema D/o Late K.P.Ramachandra Menon, aged 55 years, Flat No.10, 1/836, Ranjini Apartments Chathapuram Junction, Kalpathy, Palakkad.
4. Manikandan alias Mani.K.Menon, 127, Madhavam, Subbain Nagar, Kottampatti, Post Mahalingapuram, Pollachi, Tamilnadu-642 002.

Suppl.5 to 7

5. Chenthamara, aged 55 years, S/o Late Azhagan, Panayamchira, Mannalur Po, Palakkad, Pin-678 502.
6. Thayu, aged 68 years, W/o Madhavan, Kottapalla, Below Kottamala, Mannalur Po, Palakkad, Pin-678 502.
7. Narayanan, aged 66 years, S/o Late Chami, Edapparambil, Mannalur Po, Palakkad, Pin-678 502.

(Impleaded and amended as per order in IA Nos.275/2022 & 276/2022 dated 03.06.2022)

8. Janardanan, aged about 75 years, Gokulam, Manjaloor, Ethanur, Alathur Taluk, Palakkad, Pin-678 502.

(Impleaded and amended as per order in IA Nos.1805/2022 & 1806/2022 dated 01.10.2022)

This suit coming on this day for final hearing before me in the presence of Sri.P.Sreeprakash & Smt.Rajani.R.Mohan, Advocates for plaintiff and Sri.N.R.Venkitanarayanan & Sri.Saju Abraham, Advocates for D2, Smt.Smithadevi.S., Advocate for D3, D4, Sri.N.R.Venkitanarayanan, Advocate for D6, D7, Sri.N.R.Venkitanarayanan & Smt.Soumya Iyer, Advocates for D8, and D1 died, D5 called absent, set exparte, this court delivered the following.

J U D G M E N T

1. This is a suit filed seeking a decree for partition and separate possession of the plaint schedule property.

2. **Case of the plaintiff in brief** : The plaint schedule property originally belonged to late K.P. Ramachandra Menon who is the father of the plaintiff and defendants 2 to 4. First defendant is the mother of the plaintiff. For the past so many years, plaintiff is permanently residing at Mumbai and plaint schedule property is being looked after by the second defendant for and on behalf of other co-owners. Mr.K.P. Ramachandra Menon expired on 12/06/1990 and prior to his death he was suffering from so many ailments and was incapable of managing his affairs. From 1989 onwards his health condition deteriorated and his memory was very weak.

He was not in a sound disposing state of mind and he was under the care and custody of the first defendant during this time. Ramachandra Menon died intestate and since plaintiff is at Mumbai and settling in Kerala was remote, the plaintiff decided to partition the property. The plaintiff made repeated requests to all the legal heirs but the second defendant was not amenable for partition. Ultimately, the plaintiff issued a registered lawyer notice to the second defendant demanding partition and he sent a reply by taking false contentions. The first defendant had no absolute marketable title over the property and document if any executed in favour of second defendant can only have the consequence of transfer of fractional interest of the first defendant in the property. Plaintiff and defendants are entitled to get 1/5 share each in the property. From the conduct of the defendant it is clear that partition is not possible except through due process of law. So the plaintiff prays for partition and separate possession of the plaint schedule property. Hence, the suit.

3. **The second defendant filed the written statement by taking the following contentions** : The plaint schedule property is not partible and it exclusively belongs to the second defendant and her husband named Janardhana Menon. The plaintiff, defendant No. 1 and defendant No. 3 and 4 have no manner of right, title, interest and possession over the plaint

schedule property and the house therein. Since the plaintiff is not having any right in the property, the plaintiff has to value the suit under section 37 (1) of Kerala Court Fees and Suit Valuation Act, 1959 and the plaintiff is liable to pay court fee on the market value of the plaint schedule property and the house therein. The averment that from 1989 onwards the health condition of the deceased K.P. Ramachandra menon was deteriorating day by day and his memory was very weak, health condition was bad and he was not in a sound disposing state of mind is not correct. The contention that the deceased K.P. Ramachandra Menon was under the care and custody of the first defendant during this time and he died intestate are absolutely false and vexatious statement and it is denied by the defendant. Deceased K.P. Ramachandra Menon was hale and healthy till his last breath. The suit is filed by the plaintiff by way of a larger conspiracy in collusion with other defendants knowing fully well about the registered Will bearing No. 3/1990 of SRO, Kuzhalmannam executed by deceased Ramachandra Menon. The above Will was executed by K.P. Ramachandra Menon in favour of the first defendant out of his love and affection towards her, out of his free volition, without any coercion, fraud, undue influence, instigation etc. and he bequeathed all his properties, including the plaint schedule property in favour of the first defendant. On the strength of the above said Will, the first defendant sold paddy land to third parties and the plaintiff and

defendants 3 and 4 are quiet aware and conscious about the sale deed executed by the first defendant on the strength of the aforesaid Will. The second defendant and her husband purchased the plaint schedule property and the house therein with all improvements from the first defendant for a total sale consideration of ₹1,25,000/- (Rupees one lakh twenty five thousand only) as per document No.2429/2008 of SRO, Kuzhalmannam. Second defendant and her husband are bonafide purchasers of the plaint schedule property for valuable consideration in good faith. After purchasing the property the second defendant and her husband demolished the old tiled house in the property and constructed a new house by incurring an amount of ₹12 lakhs. Plaintiff, his family and other defendants participated in the house warming ceremony of the newly constructed house in the plaint schedule property by the second defendant and her husband. The third defendant could not attend the house warming function as she was at Kanpur. The second defendant and her husband has been paying basic tax for the plaint schedule property and building tax for the house situated in the plaint schedule property. The second defendant and her husband are in actual, exclusive physical possession and enjoyment of the property excluding the plaintiff and other defendants. The plaintiff and other defendants are not entitled to get any share in the property and it is not partible. The suit is bad for non – joinder of necessary parties as the husband

of the second defendant has not been impleaded in the party array and he is having $\frac{1}{2}$ share in the property. Suit is false, frivolous and vexatious which is filed by the plaintiff knowing fully well about the Will executed by deceased K.P. Ramachandra Menon and about the purchase of the plaint schedule property by the second defendant and her husband. The plaintiff making use of the first defendant filed false complaint before Deputy Superintendent of Police, Alathur, Revenue Divisional Officer, Palakkad and before Womens Commission against the second defendant and since all these attempts turned futile, this suit is filed as a pressurizing tactics to extort money from the second defendant and her husband. So the second defendant prays for dismissing the suit with costs and compensatory costs.

4. **The third and 4th defendant filed written statement by taking the following contentions** : K.P. Ramachandra Menon was suffering from many ailments, his memory was weak and he was not in a sound disposing state of mind. He died intestate and mother also died on 23/01/2018. So defendants 3 and 4 are entitled to get $\frac{1}{4}$ shares in the property. So these defendants prays for passing a preliminary decree adjudging $\frac{1}{4}$ share of these defendants in the plaint schedule property.

5. Supplemental 5th defendant failed to enter appearance even after receiving the summons. So he was called absent and was set exparte.

6. **Supplemental 6th defendant filed written statement by taking the following contentions** : Supplemental 6th defendant purchased 23 cents of paddy land comprised in survey No. 144/A6, 144/A12 by way of registered assignment deed bearing No. 581/1991 of SRO, Kuzhalmannam from the first defendant for valid consideration. The first defendant had right over this property by virtue of registered Will No. 3/1990 of SRO, Kuzhalmannam. The above said 23 cents of property had been in actual physical possession and enjoyment of this defendant for the past 31 years without any interruption, openly, peaceably, continuously and against the interest of the plaintiff and defendants 3 and 4 and the supplemental 6th defendant was holding the property with hostile animus to the title if any that of the plaintiff and defendant 3 and 4. The supplemental 6th defendant has been remitting land tax for the above said property. Apart from the title deed this defendant has perfected her right, title, interest over 23 cents of property by way of adverse possession, limitation and ouster. The above said 23 cents of property purchased by supplemental 6th defendant is not partible in view of the Will executed by K.P.Ramachandra Menon in favour of the deceased first defendant which is known to the plaintiff and defendants 3 and 4. Supplemental 5th defendant is having four more siblings

and they are also necessary parties to the suit and they are legal heirs of deceased Azhagan who has purchased the property from deceased first defendant. In fact none of the plaint schedule properties are partible in view of the Will aforesaid executed by deceased K.P. Ramachandra Menon and the supplemental 6th defendant prays for dismissing the suit with compensatory costs.

7. Supplemental 7th defendant filed written statement by taking the following contentions : Supplemental 7th defendant purchased 33 cents of paddy land comprised in survey No.144/A6, 144/A12 and property having an extent of 37.50 cents comprised in survey No. 144/A6, 144/A12 by way of registered assignment deed bearing No. 1125/1991 of SRO, Kuzhalmannam and 580/1991 of SRO, Kuzhalmannam from the first defendant. This defendant purchased 0.1466 hectors of paddy land comprised in new survey No.226/1 and 226/3 by way of document No.2140/2001 of SRO, Kuzhalmannam from V. Krishnan who had purchased the said property from the first defendant by way of document No.578/1991 of SRO, Kuzhalmannam. Supplemental 7th defendant is the bonafide purchaser of the above said property and the first defendant had right over the property by virtue of Will bearing No.3/1990 of SRO, Kuzhalmannam. The said properties had been in actual physical possession

and enjoyment of this defendant and his predecessor for the past 31 years without any interruption, openly, peaceably, continuously and against the interest of the plaintiff and defendants 3 and 4 and the supplemental 6th defendant was holding the property with hostile animus to the title if any that of the plaintiff and defendant 3 and 4. The supplemental 6th defendant has been remitting land tax for the above said property. Apart from the title deed this defendant has perfected her right, title, interest over 23 cents of property by way of adverse possession, limitation and ouster. The above said 23 cents of property purchased by supplemental 6th defendant is not partible in view of the Will executed by K.P. Ramachandra Menon in favour of the deceased first defendant which is known to the plaintiff and defendants 3 and 4. Supplemental 5th defendant is having four more siblings and they are also necessary parties to the suit and they are legal heirs of deceased Azhagan who has purchased the property from deceased first defendant. In fact none of the plaint schedule properties are partible in view of the Will aforesaid executed by deceased K.P. Ramachandra Menon and the supplemental 7th defendant prays for dismissing the suit with compensatory costs.

8. Supplemental 8th defendant filed written statement written by taking the following contention : The plaint schedule property is not

partible and it exclusively belongs to this defendant and the second defendant who is his wife. The plaintiff, defendant No.1, 3 and 4 are not having any right, title, interest and possession over the plaint schedule property and the house situated therein. Since the plaint schedule property is not in joint possession of the plaintiff and defendants 1, 3 and 4, the plaintiff is liable to pay court fee under section 37 (1) of Kerala Court Fee and Suit valuation Act, 1959. Supplemental 8th defendant and his wife purchased the plaint schedule item No. 3 property and house therein with all improvements from the first defendant for a total sale consideration of ₹1,25,000/-(Rupees one lakh twenty five thousand only) as per document No.2429/2008 of SRO, Kuzhalmannam. First defendant sold this property to this defendant and his wife on the strength of the registered Will executed by deceased K.P. Ramachandra Menon. This defendant and his wife are bonafide purchasers of plaint schedule item No.3 property for valuable consideration in good faith. After purchasing the property they demolished the old tiled house in the property and constructed a new house by incurring an amount of ₹12 lakhs. The plaintiff and his family, first and 4th defendant and their families participated in the house warming ceremony of the newly constructed house in the plaint schedule property. The above suit is filed to entangle this defendant and his wife in legal proceedings and to prevent them from enjoying their properties. So the supplemental 8th

defendant prays for dismissing the suit with costs.

9. On the basis of the above pleadings the following issues were raised for trial:

1. Whether the plaint schedule property is partible ? If so, what is the extent of share of each parties ?
2. Whether the suit is bad for non – jointer of necessary parties ?
3. Whether the suit is properly valued ?
4. Whether the will relied upon by the second defendant is genuine ?
5. Reliefs and costs.

10. On the side of the plaintiff, no oral or documentary evidence was adduced and on the side of the defendants DW1 to DW3 were examined and Ext.B1 to Ext.B23 were marked.

11. Heard the plaintiff and the defendants.

12. **Issue No. 3** :- Defendant No. 2 and supplemental defendant No. 8 contended that the plaint schedule property is not in joint possession and enjoyment of plaintiff, defendant No. 1 and defendant No. 3 and 4 as well as these defendants and the plaintiff has no right, title, interest and possession over the plaint schedule property. These defendants contended

that the father of the plaintiff as well as defendants 2 to 4 and the husband of the first defendant named K.P. Ramachandra Menon executed Will No. 3/1990 of SRO, Kuzhalmannam in favour of the first defendant bequeathing the entire plaint schedule property in favour of the first defendant. After the death of the father, the above said Will which was marked as Ext.B1 came into force and the first defendant on the strength of the above said Will sold paddy land to third parties and plaint schedule property to the second defendant and supplemental 8th defendant as per document No. 2429/2008 of SRO, Kuzhalmannam for a total sale consideration of ₹1,25,000/- (Rupees one lakh twenty five thousand only) and the second defendant as well as the supplemental 8th defendant are bonafide purchasers of the plaint schedule property for valuable consideration in good faith. So according to these defendants since the plaintiff is not in joint possession of the plaint schedule property along with the defendants he is liable to pay court fee which is computed on the market value of the plaintiff's share under section 37 (1) of the Kerala Court Fees and Suit valuation Act, 1959.

13. According to the plaintiff after the death of father K.P. Ramachandra Menon on 12/06/1990 the plaint schedule property devolved upon his legal heirs who are the plaintiff and defendant since the father died intestate. So according to the plaintiff the property was being managed

by the first defendant for and on behalf of the other defendants and he is in joint possession of the plaint schedule property along with other defendants. Joint possession within the meaning of sub section 2 of section 37 of the Kerala Court Fees and Suit valuation Act, 1959 does not mean joint physical possession for all practical purposes. Possession by some of the co – owners and enjoyment of the property by them alone is not sufficient to constitute exclusion from possession of the remaining co-owners. Even though the second defendant and the supplemental 8th defendant are relying on Ext.B1 Will allegedly executed by K.P. Ramachandra Menon in favour of the first defendant and thereby the first defendant on the strength of that Will executed sale deed in favour of the second defendant and the supplemental 8th defendant, the Will is to be proved by the propounder as per the mandate under section 68 of Indian Evidence Act, 1872 read with section 63 of the Indian Succession Act, 1925. Hon'ble High Court of Kerala in **E.P Muthu Rawther v. Muhammedali Rawther 1970 KLT 1043** has held that:

“the proper court fee payable would depend upon whether the plaintiff has been excluded from possession or he is in joint possession of the property in respect of which the suit for partition was brought. It is conceded that for the purpose of court fee, the allegations in the plaint are material, and these leave us in doubt that the plaintiff proceeded on the footing that himself and the first defendant are the

co – owners and that the possession of the first defendant was on behalf of the other co – owners from whom the plaintiff derived right.”

14. So for the purpose of computing court fee only the allegations in the plaint is to be taken into account and the contentions in the written statement are immaterial for the purpose of deciding the court fee. Since in this case, the plaintiff has contended that he is in joint possession of the plaint schedule property and since the joint possession need not be physical possession. It is clear that the plaintiff need to be pay court fee only under section 37 (2) of the Kerala Court Fees and Suit Valuation Act, 1959 and the suit is properly valued. So this issue is found in favour of the plaintiff.

15. **Issue No. 2** :- The second defendant in her written statement contended that the first defendant on the strength of Ext.B1 Will executed by K.P. Ramachandra Menon executed Ext.B2 document with respect to the plaint schedule property and alienated the property in favour of the second defendant and her husband. So the second defendant contended that since her husband is having half share in the property he is a necessary party in the suit and he is to be impleaded. Thereafter, the husband of the second defendant was impleaded as supplemental 8th defendant as per order in IA 1905/2022.

16. Supplemental defendant No. 6 and 7 have taken a contention that the first defendant alienated 23 cents of paddy land in survey No. 144/A6 and 144/A12 as Ext.B21 document. They also contended that the first defendant alienated 33 cents of paddy land in survey No. 144/A6 and 144/A12 as per document No. 1125/1991 of SRO, Kuzhalmannam and 37.5 cents of property in survey No. 144/A6 and 144/A12 as per Ext. B12 document. It is also mentioned that the supplemental 5th defendant also purchased property from the first defendant as per Ext.B22 document. These defendants have contended that the supplemental 5th defendant is having four more siblings by name Sivanarayanan, Kumari, Theethunni and Mohanan and they are also necessary parties in this suit since they are the legal heirs of deceased Azhagan who had purchased property from the deceased first defendant. Supplemental defendants 5 to 7 were impleaded as per order in IA 275/2022. These defendants were impleaded since it is alleged that they are the persons who purchased properties from the first defendant. Supplemental defendants 6 and 7 have no contention that a person by name Azhagan has also purchased property from the deceased first defendant. There is also no averment with regard to the document by virtue of which the above said Azhagan purchased property from the deceased first defendant. As per **Rule 228 of Civil Rules of Practise, 1971** in every suit for partition all persons entitled to shares or to maintenance

shall be joined as parties; and if it is alleged that any co – owner has alienated any portion of the joint property or his interest therein in circumstances rendering the alienation not binding on the co – owners, the alienee shall be made a party to the suit and the party making the allegation shall set out the particulars of the alleged alienation in his pleadings. So the party making the allegation has to set out the particulars of the alleged alienation in his pleadings. But in the written statement filed by supplemental defendants 6 and 7 there is no particulars with regard to the document by virtue of which the property was purchased by Azhagan from the deceased first defendant. So without such particulars the contention by the supplemental defendants 6 and 7 that the legal representatives of deceased Azhagan are not arrayed as parties is not sustainable.

17. The question of impleading a party must be decided on the basis of Order 1 Rule 10 of C.P.C. A necessary party is one without whom no effective decree can be passed. From the pleadings it is revealed that all the necessary parties were already included in the party array and the supplemental 5th defendant is already set ex-parte. The legal representatives of deceased Azhagan whose names are mentioned in the written statement filed by supplemental 6 and 7th defendant are not necessary parties in the suit since there is no particulars with regard to the transfer of the plaint

schedule property by the first defendant to Azhagan. So the suit is not bad for non – joinder of necessary parties. So this issue is found in favour of the plaintiff.

18. **Issue No. 1 and 4** :- For the sake of brevity and convenience these issues are considered together. According to the plaintiff the plaintiff schedule property originally belonged to K.P. Ramachandra Menon who is his father and he died intestate on 12/06/1990. So according to the plaintiff, the property devolved upon the plaintiff and defendants 1 to 4 who are the legal heirs of deceased K.P. Ramachandra Menon. Plaintiff is claiming 1/5 share in the plaintiff schedule property. The second defendant along with supplemental 8th defendant who is her husband have taken a contention that the plaintiff schedule properties are not partible since K.P. Ramachandra Menon who is the husband of deceased first defendant executed Will No.3/1990 of SRO, Kuzhalmannam in favour of the first defendant bequeathing the entire plaintiff schedule property in her favour and according to these defendants this will was executed by K.P. Ramachandra Menon out of his free will and volition because of his love and affection towards the first defendant and the properties included in the Will includes the plaintiff schedule property. Thereafter, the first defendant on the strength of the above said Will execute Ext.B2 document alienating the plaintiff

schedule property along with the old tiled house in the property to the second defendant as well as the supplemental 8th defendant for a total sale consideration of ₹1,25,000/- (Rupees one lakh twenty five thousand only). It is also mentioned that the paddy lands were alienated by the first defendant to third parties. The second defendant and supplemental 8th defendant contended that they constructed a new house in the plaint schedule property by spending an amount of ₹12 lakhs and all these facts are known to the plaintiff as well as defendants 3 and 4. The bonafide purchasers of some of the properties which was obtained by the first defendant on the strength of Ext.B1 Will who were impleaded as supplemental defendants 6 and 7 also contended that they purchased paddy lands as well as some other properties from the first defendant by virtue of Ext.B21 and Ext.B23 documents as well as document No. 1125/1991. The third and 4th defendants are going along with the plaintiff and they are amenable for partition.

19. Ext.B1 is the original of the Will allegedly executed by K.P. Ramachandra Menon in favour of the first defendant. As per Ext.B1 the entire property belonging to Ramachandra Menon has been bequeathed in favour of the first defendant. Ext.B1 is dated 24/01/1990 and it is a registered Will. It is the duty of the propounder to prove the execution and

genuineness of the Will and to explain the suspicious circumstances if any surrounding the execution of the Will. Due execution of the Will cannot be proved otherwise than by a recourse to section 68 of the Evidence Act, 1872 and section 63 of the Indian Succession Act, 1925.

Section 68 of The Indian Evidence Act, 1872 is as follows :

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.]

Section 63 of the Indian Succession Act, 1925 is as follows :-

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

20. Section 68 of the Evidence Act does not contain any distinction between an admitted Will and a disputed Will as regards the mode of proof. Even though no replication is filed challenging the Will by the plaintiff it is the legal obligation of the second defendant and the supplemental 8th defendant who are claiming right in the plaint schedule property on the basis of Ext.B2 document which was executed on the strength of Ext.B1 Will. The propounder of the Will who is the first defendant is no more. So the burden of proof is on the second and supplemental 8th defendant who

are claiming exclusive right over the plaint schedule property which according to them was alienated by the deceased first defendant on the strength of Ext.B1 Will. In Ext.B1 there are two attesting witnesses by name Nilanathu Swaminathan and K.P. Vasudeva Menon. Both these attesting witnesses are no more and as a result they could not be examined as contemplated under Section 68 of the Indian Evidence Act to prove the execution of the Will. Therefore, the Will is to be proved as per Section 69 of the Indian Evidence Act.

Section 69 of The Indian Evidence Act, 1872 is as follows :-

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

21. So it is for the propounder of the document to prove that attestation of at least one attesting witness in the Will is in his handwriting and the signature of the person executing the document is in the handwriting of that person. In order to prove the execution of the Will as per Section 69 of the Indian Evidence Act, the daughter of one of the attesting witness named K.P.Vasudeva Menon was examined as DW3.

During examination -in-chief she deposed that she is not acquainted with the signature of her father and she is not aware as to whether the signature against the name K.P. Vasudeva Menon in page No. 2 of Ext.B1 belongs to her father. The testator of the Will K.P. Ramachandra Menon is her father's elder brother of DW3 and according to her, her father had not executed any document in her favour. So DW3 is not acquainted with the signature of the attesting witness named K.P. Vasudeva Menon and she also failed to identify the signature in Ext.B1. The scribe who prepared Ext.B1 will was examined as DW2 and according to him he prepared Ext.B1 Will as per the request of Ramachandra Menon. DW2 would say that even before the preparation of Ext. B1, Ramachandra Menon used to visit his office and he is acquainted with the signature and handwriting of Ramachandra Menon. According to him before the execution of Ext.B1 he has seen Ramachandra Menon putting his signature in other documents. DW2 would say that initially Ramachandra Menon signed in Ext.B1 followed by attesting witnesses and the attesting witnesses signed in the Will in the presence of DW2 and Ramachandra Menon. During cross examination DW2 was unable to depose as to whether he has prepared any registered document in which Ramachandra Menon is a party and he was also unable to depose as to whether Ramachandra Menon had signed as a witness in any of the documents. According to DW2 Ramachandra Menon wrote K.P.

Ramachandra Menon in English in Ext.B1 and thereafter affixed his signature against the same. DW2 is not acquainted with the attesting witnesses who according to him accompanied Ramachandra Menon to his office and he prepared the Will as per the instructions given by Ramachandra Menon. So from the evidence of DW2 it is revealed that he is acquainted with the signature and handwriting of deceased Ramachandra Menon and he identified the signature in Ext.B1. But he is not acquainted with the attesting witnesses or their signatures. Hon'ble High Court of **Kerala in Raveendran C.G and others v. C.G. Gopi and Others** reported in **2015 (3) KLT 740** has dealt with Section 68 and Section 69 of the Evidence Act and held that:

“It is on record that both the attesting witnesses are no more alive. Hence, S.68 of the Indian Evidence Act can not apply. The provision that governs the field can only be the S.69 of the Indian Evidence Act. It deals with a situation wherein no attesting witnesses can be found, and in such cases it will have to be proved in the manner mentioned in S.69. Though the Statute prescribes that S.69 applies when the witness is not found, in the absence of any other provision dealing with cases wherein the presence of witnesses cannot be procured for various other reasons, like death of both attesting witness, out of

jurisdiction, physical incapacity, insanity etc. S.69 should apply and can be extended to such cases . Hence, the word "not found" occurring in S.69 of Evidence Act should receive a wider purposive interpretation than its literal meaning and should take in situation where the presence of the attesting witness cannot be procured."

22. So it is for the propounder of the Will to prove that the attestation is in the handwriting of the attesting witness and the document was signed by the executants. Both these limbs have to be cumulatively proved by the propounder. The evidence of DW2 reveals that he has identified the signature of the testator in Ext.B1. But his statement that the attesting witnesses also signed in the Will in his presence is not sufficient to prove the handwriting of the attesting witnesses. Mode of proving handwriting is as per section 45, 47 and 73 of the Indian Evidence Act, 1872. Under section 45 the Indian Evidence Act, the court has taken the view of an expert and as per Section 47 of the Indian Evidence Act, the court has to take the view of a person who is acquainted with the handwriting of the person by whom, the document is supposed to be written or signed. As per section 73 of the Act, the court can compare the writings and signatures to form an opinion with regard to the same. In this case, no steps were taken by the second and supplemental 8th defendant to send the original will along with admitted

signatures of the testator to an expert for getting an opinion after comparison. So section 45 of the Indian Evidence Act cannot be invoked in the present case to prove the signature of the testator and attesting witnesses in Ext.B1 Will.

Section 47 of the Indian Evidence Act, 1872 is as follows :-

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.--*A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.*

23. Since DW3 is not acquainted with the signatures of the attesting witnesses his oral testimony that the attesting witnesses signed in Ext.B1 in

his presence is not sufficient to prove their signatures. So the oral testimony of DW2 and DW3 will not prove the execution of Ext.B1 will as per Section 69 of Indian Evidence Act, 1872. Moreover DW3 is only a scribe who prepared the Will. He is not an attesting witness to the Will. There is also no legal bar in the scribe becoming the attesting witness. Hon'ble High Court of **Kerala in Raveendran C.G and others v. C.G. Gopi and Others** reported in **2015 (3) KLT 740** in paragraph 17 has held that :

“ There is no legal bar in scribe himself being an attesting witness, provided he has actually seen the executant signing or affixing his mark or has received a personal acknowledgment from the executant and has consciously affixed his signature as an attesting witness, as a token of having witnessed the executant signing or affixing his mark. Evidence should prove that the scribe, apart from being so, had signed for the purpose of testifying to the signature of the executant and had the animo attestandi.”

At the time of argument the counsel for the 2nd and supplemental defendants 6 to 8 vehemently contended that even though no steps were taken for sending the signatures of the testator and attesting witnesses for getting the opinion of the expert, the court can very well compare the signature of the testator in Ext.B1 and Ext.B3 document to come to a

conclusion with regard to the genuineness of the signature of the testator in Ext.B1. Ext.B3 is the original partition deed No. 806/1953 of SRO, Kuzhalmannam executed between Nanikutty Amma and others wherein late K.P. Ramachandra Menon is also a signatory according to the defendants.

Section 73 of the Indian Evidence Act, 1872 is as follows :-

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

24. Hon'ble High Court of Kerala in **Vishnu Namboodiri E. V v. Balachandran** reported in **2020 (2) KLT 497** in paragraph 3 has held that:

“ S.73 of the Evidence Act is really a rule of caution and prudence and not a substitute for an expert opinion under S.45 of the Evidence

Act. The Court is not precluded from coming to its conclusion by a comparison under S.73 of the Act. But the Court is not an expert and cannot be an expert and as such, its conclusion may have its own infirmities. The Court cannot act as a witness to its proceedings and cannot draw an expert opinion as contemplated under S.45 of the Evidence Act under the guise of power vested under S.73 of the Act. In short, the conclusion arrived at by the Court under S.73 of the Evidence Act is not an expert opinion as embodied under S.45 of the Act and the Court cannot be an expert within the meaning of that section. The expression 'may be compared' in the main portion of S.73 and the expression 'for the purpose of enabling the Court to compare' incorporated in the second paragraph would amply show that a comparison under that section is only a rule of caution and prudence and cannot be substituted in the place of proof."

The judgment and decree of both courts were set aside by the Hon'ble High court since finding rendered was on the sole basis of comparison under section 73 of the Evidence Act of the due execution of the promissory note.

25. So it is not safe to come to a conclusion with regard to the signature of the attesting witness by comparing the signatures by resorting

to section 73 of the Indian Evidence Act, 1872 since such a comparison cannot be substituted in the place of proof. Moreover, on comparing the signatures of K.P. Ramachandra Menon in Ext.B1 and Ext.B3 it could be seen that apart from the writings 'K.P. Ramachandra Menon', the signature after the same is different in both these documents. Ext.B3 is of the year 1953 and Ext.B1 is of the year 1990. There may be natural variation in the signature of the person due to lapse of time. But as discussed earlier arriving at a finding with regard to the genuineness of the signature of the testator and the attesting witness in Ext.B1 solely based on the comparison by the court is not sufficient to prove the execution of the Ext.B1 Will. So the contention by the counsel for the defendants that the court can come to a conclusion with regard to the genuineness of Ext.B1 Will based on the comparison of the signature of the testator by court itself is not sustainable. Another contention put forward by the counsel for the defendant is that Ext.B1 is more than 30 years old presumption under section 90 of the Indian Evidence Act, 1872 is applicable to the document and there is presumption with regard to its execution and attestation and unless the presumption is rebutted everything mandated under Section 63 the Indian Succession Act will be established by the operation of the presumption. In support of the contention the counsel for the defendant brought my attention to the Ruling of the Hon'ble High Court of Kerala in **Narambrath**

Ramadasan v. N. Leela reported in **2020 (1) KLJ 202** wherein the Hon'ble High court of Kerala has held that:-

“The presumption available under S.90 of the Act is so exhaustive and in the case of a document not required by law to be attested, the court can presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document required by law to be attested, the presumption would extend not only to its execution, but also to its attestation by the person by whom it purports to be attested. In other words, in the matter of an ancient Will or Codicil produced from proper custody, the presumption available under S.90 of the Evidence Act would extend to all the requirements to be complied with under S.63 of the Indian Succession Act. More specifically, there would be a presumption regarding compliance of mandate under clauses (a) to (c) to S.63 of the Indian Succession Act in the matter of a Will or Codicil that the signature or mark was affixed by the testator or any other person on his behalf under his direction and in his presence and that attestation was done by two witnesses as mandated therein, besides the presumption that the testator or the person who had signed on his

behalf by his signature or mark had intended to effectuate the writing as a Will. Unless the presumption is rebutted, everything mandated under S.63 of the Indian Succession Act would stand established by the operation of the presumption available under S.90 of the Evidence Act and the initial burden lies on the person who claims the Will as genuine would stand discharged. But at the same time, a mere production of a document of 30 years old from a proper custody would not itself permit the Court to draw a presumption mechanically. The Courts have to act with extreme caution and with utmost circumspection, having regard to the facts and circumstances of the case, for which the Court must be satisfied that the document produced on its face is free from suspicion and came from proper custody.”

26. In reply, the counsel for the plaintiff contended that Ext.B1 was filed by the second defendant along with the written statement on 13/02/2017 and at that time the document was not 30 years old since Ext.B1 was executed on 24/01/1990. Ext.B1 was admitted in evidence and marked subject to proof on 13/03/2020 that is after 30 years of execution of the document. But Ext.B1 was not proved by the defendants as per

Section 69 of the Indian Evidence Act, 1872. The counsel for the plaintiff drew my attention to the ruling of the Hon'ble Supreme Court of India in **Ashuthosh Samanta (D) by LRS and others v. S.M. Ranjam Bala dasi and others** 2023 LIVELAW SC 190 wherein the Hon'ble Supreme Court is held that:

“This court, in M.B. Ramesh (D) by L.Rs. v K.M. Veeraje Urs (D) by L.Rs. & Ors., while dealing with a similar argument regarding applicability of Section 90 in the case of proof of will, held as follows:

“At the same time we cannot accept the submission on behalf of the Respondents as well that merely because the will was more than 30 years old, a presumption under Section 90 of the Indian Evidence Act, 1872 ('Evidence Act' for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in Bharpur Singh v. Shamsher Singh reported in 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63(c) of the Succession Act read with Section 68 of the Evidence Act. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be

executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir v. Narayan Namdeo Kadam reported in 2003 (2) SCC 91 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted."

13. In view of the above decision, wills cannot be proved only on the basis of their age – the presumption under Section 90 as to the regularity of documents more than 30 years of age is inapplicable when it comes to proof of wills, which have to be proved in terms of Sections 63(c) of the Succession Act, 1925, and Section 68 of the Evidence Act, 1872."

27. So from the ratio of this ruling it is revealed that Will cannot be proved only on the basis of their age and the presumption under section 90

of the Indian Evidence Act, 1872 as to the regularity of documents more than 30 years of age is inapplicable when it comes to proof of Will which has to be proved as per mandate under Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, 1925. With regard to the evidence of the scribe the counsel for the plaintiff drew my attention to the ruling of the Hon'ble High Court of Kerala in **Lisamma v. Saramma others 2017 (3) KHC 27** wherein the Hon'ble High Court of Kerala has held that :

“ S.63(c) of the Act mandates that a Will shall be attested by two or more witnesses. What is prescribed in the Section is that there shall be a minimum of two witnesses for valid attestation. Any number of witnesses more than two could be there. From Ext.A2, it can be seen that the scribe has put his signature to the document without any manifestation of animo attestandi or animus or intent to attest. This is all the more clear from the recitals in Ext.A2 itself. He prepared the document and signed it as a scribe only. Therefore, in the absence of exhibiting any animo attestandi, it cannot be held that the scribe could claim an elevated status of an attesting witness. Ext.A2 Will is attested by two persons, out of which one is disqualified under S.67 of the Act. Therefore, the Will is not properly attested as required under S.63 of the Act.” So the evidence of DW3 who is only a scribe who allegedly prepared the will cannot be taken into account to prove the attestation.

28. The second defendant was examined as DW1 and from her evidence it is revealed that the expired first defendant who is her mother formerly preferred a complaint against her before the Maintenance Tribunal at Palakkad and she also did not attend the funeral of her mother since according to her she was not informed about the same. The proceedings before the Revenue Divisional Officer and the certified copy of the complaint preferred by the first defendant is not produced by the plaintiff before this court. But it is revealed that DW1 has not disputed the fact that her mother had preferred a complaint with certain allegations against her before the Maintenance Tribunal, Palakkad. From the evidence of DW1 it is also revealed that at the time of executing Ext.B2 document the mother had money which she obtained by selling the paddy land and cow belonging to her and she was not in dire need of money. DW1 also admitted the fact that there is no documentary evidence to prove that she paid consideration to her mother. So the evidence of DW1 reveals the fact that at the time of executing Ext.B2 mother was not in dire need of money and she also filed a complaint against DW1 before the Maintenance Tribunal. So the circumstances reveals that the possibility of mother alienating the plaint schedule property in favour of the second defendant and supplemental 8th defendant is remote.

29. Supplemental 6th and 7th defendant have taken a contention that they are having title to some of the properties covered by Ext.B1 Will except the plaint schedule property based on Ext. B21, Ext.B23 and document No. 1125/1991 of SRO, Kuzhalmannam. These documents were executed by the first defendant on the strength of Ext.B1 Will. At the same time these defendants have also contended that the above said properties are in their actual physical possession and enjoyment for the past 31 years which includes the possession of their predecessor without interruption, openly, peaceably, continuously and against the interest if any that of the plaintiff and defendant 3 and 4 and they were holding possession of this property hostile to the title if any that of the plaintiff and defendant No. 3 and 4. So these defendants are also claiming title to the property on the basis of adverse possession and limitation. To establish adverse possession the possession must be adequate in continuity, in publicity and extent and there should be pleading to the effect as to when the possession became adverse to that of the real owner so that the starting point of limitation against the party affected can be found. In this case, there is only a vague pleading to the effect that the supplemental 6th and 7th defendant as well as their predecessors wherein possession of the property hostile to the real owner for the past 31 years and there is no pleading with regard to the date from

which the possession became adverse. Moreover, according to these defendants their predecessor was also possessing the property adversely to the real owner. But as per the pleadings these defendants purchased the property from deceased first defendant who according to them acquired right over the property on the basis of Ext.B1 Will. So the contention by these defendants that their predecessor was also holding the property adversely cannot be accepted. Moreover, there is no specific pleading with regard to the date from which the possession became adverse. Moreover, these defendants have taken mutually contradictory plea by taking the contention with regard to the title on the basis of documents and adverse possession which are mutually destructive and it cannot be allowed to be raised. These defendants cannot claim title based on documents and claim adverse possession at the same time. By claiming adverse possession they are admitting the fact that they don't have title to the property. The non examination of the plaintiff is not fatal to the case of the plaintiff since the burden is on the defendants to prove the due execution and attestation of the Will and no adverse inference can be drawn against the plaintiff.

30. So the contention by this defendant are not sustainable and since the execution of Ext.B1 Will is not proved the documents which are executed on the strength of such a Will also becomes void and it will not

affect the property covered by those documents. So Ext.B2 document as well as Ext.B21 to Ext.B23 which are executed on the basis of Ext.B1 Will are void which will not affect the plaint schedule property as well as other properties which belonged to K.P. Ramachandra Menon. Since the execution of Ext.B1 Will is not proved it is clear that such a Will is not genuine. So it is clear that the plaint schedule property is partible and the plaintiffs and defendants 2 to 4 are entitled to get 1/4 share each in the plaint schedule property. So issue No. 1 and 4 are found in favour of the plaintiff.

31. **Issue No. 5** :- In the light of the discussions in issue No. 1 and 4, it is clear that the plaint schedule property is partible and the plaintiffs and defendants 2 to 4 are entitled to get 1/4 share each in the plaint schedule property and the suit is liable to be decreed. Since it is found that the plaint schedule property is partible and the claim is not false or vexatious to the knowledge of the plaintiff the question of imposing compensatory costs does not arise in this case.

32. In the result, suit is decreed and a preliminary decree is passed as follows.

- i) Plaint schedule properties shall be divided into 4 equal shares and the plaintiff is entitled to get 1/4 share in the plaint schedule property.

- ii) Defendants 2 to 4 are entitled to get 1/4 share each in the plaint schedule property.
- iii) The shares of defendants 2 to 4 shall be allotted to them on payment of requisite court fee.
- iv) Plaintiff is entitled to costs in the suit.
- v) Either of the parties at liberty to take steps under Order 20 Rule 18 CPC for appointing a commissioner to divide the property in accordance with the preliminary decree within one month from the date of decree.

Dictated to the Confidential Assistant, transcribed and typed by him, corrected and pronounced by me in open court on this the 13th day of April, 2023.

Principal Sub Judge.

Appendix

Plaintiff's witness and exhibit : Nil

Defendants witness :

DW1 : 19.03.2020 : Jalaja.

DW2 : 15.03.2021 : T.K.Jagadeesan.

DW3 : 24.03.2021 : Bhaghyalakshmi.

Defendants' exhibits :

B1 : 24.01.1990: Original Will bearing No.3/1990 of SRO, Kuzhalmannam.

B2 : 12.08.2008 : Original Jenm Assingment Deed No.2429/I/2008 of SRO, Kuzhalmannam executed by Visalakshmi Amma alias Santha to K.P.Janardhana and Jalaja.

- B3 : 16.02.1953 : Original Partition Deed executed between K.P.Nanikutty and others.
- B4 : 09.08.2016 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B5 : 17.04.2015 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B6 : 10.12.2013 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B7 : 31.05.2012 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B8 : 05.07.2011 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B9 : 18.09.2010 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B10 : 05.08.2009 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B11 : 29.08.2008 : Basic Tax Receipt issued by Village Officer-II, Thenkurissy in the name of K.P.Janardhanan and Jalaja.
- B12 : 22.09.2016 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.
- B13 : 01.08.2015 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.
- B14 : 19.07.2014 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.
- B15 : 07.12.2013 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.
- B16 : 05.07.2011 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.

- B17 : 21.05.2010 : Property Tax receipt issued by Secretary, Thenkurissy Grama Panchayath.
- B18 : 09.11.2016 : Copy of lawyer notice sent by N.R.Venkitanarayanan, Advocate to Deputy Superintendent of Police, Alathur.
- B18(a) : ----- : Acknowledgment Card.
- B18(b) : ----- : Acknowledgment Card.
- B18(c) : ----- : Postal Receipt.
- B18(d) : ----- : Postal Receipt.
- B19 : 20.09.2016 : Copy of lawyer notice sent by Adv.P.Sreeprakash to Jalaja.
- B20 : 06.10.2016 : Reply notice sent by Adv.N.R.Venkitanarayanan to Adv.P.Sreeprakash.
- B20(a) : ----- : Acknowledgment Card.
- B20(b) : ----- : Postal Receipt.
- B21 : 06.04.1991 : Certified copy of Jenm Assignment Deed No.581/1991 of SRO, Kuzhalmannam executed by Visalakshi alias Santha to Thayu.
- B22 : 08.04.1991 : Certified copy of Jenm Assignment Deed No.579/1991 of SRO, Kuzhalmannam executed by Visalakshi alias Santha to Azhakan.
- B23 : 06.04.1991 : Certified copy of Jenm Assignment Deed No.580/1991 of SRO, Kuzhalmannam executed by Visalakshi alias Santha to Narayanan.

Court witness and exhibit : Nil

Principal Sub Judge

Typed by: Sahadevan.M.
Compared by:Sajitha.R.

Fair/Copy/Judgment in
OS.No.12/2017

Dated:13.04.2023