

IN THE COURT OF THE MUNSIFF, VAIKOM

Present: Sri. Atheek Rahman, Munsiff.

Thursday 6th day of July 2023
15th day of Ashadha 1945

O.S.54/2017

Plaintiff :-

Alice, aged 44, W/o. Benchamin,
Karottu Puliyaorathil, Vadakara P.O.,
Vadakara Muri, Velloor Village,
Vaikom Taluk.

By Adv. P. Venu.

Defendants:-

- 1 Joy, aged 52, S/o. Yohannan
residing at Thuruthipally House,
Peruva P.O., Peruva Kara,
Mulakkulam Village, Vaikom Taluk.
2. Thankamma, aged 48, W/o. Joy
Thuruthipally House, Peruva P.O.,
Peruva Kara, Mulakkulam Village,
Vaikom Taluk.
3. Joby, aged 28, S/o. Joy,
Thuruthipally House, Peruva P.O.,
Peruva Kara, Mulakkulam Village,
Vaikom Taluk.

4. Jomesh, aged 27, S/o. Joy,
Thuruthipally House, Peruva P.O.,
Peruva Kara, Mulakkulam Village,
Vaikom Taluk.
5. Soumya, aged 22, W/o. Jomesh,
Thuruthipally House, Peruva P.O.,
Peruva Kara, Mulakkulam Village,
Vaikom Taluk.
6. Jogin, aged 2 years, S/o. Jomesh,
Thuruthipally House, Peruva P.O.,
Peruva Kara, Mulakkulam Village,
Vaikom Taluk, represented by his
guardian and father Jomesh, aged 27,
S/o. Joy, Thuruthipally House,
Peruva P.O., Peruva Kara,
Mulakkulam Village, Vaikom Taluk.

By Adv. Rajan K. Nair.

This suit having been finally heard on 04.07.2023 and the Court on 06.07.2023 delivered the following:-

JUDGMENT

Suit is for declaration, recovery of possession and for mandatory as well as prohibitory injunction.

2. Brief averments in the plaint are as follows:- The 1st defendant is the brother of the plaintiff. The 2nd

defendant is the wife of 1st defendant and defendants 3 and 4 are their children. The 5th defendant is the wife of 4th defendant and 6th defendant is their minor son. The 6th defendant is represented by 4th defendant. The name of the parents of plaintiff is Yohannan and Mariyamma. Apart from the plaintiff and 1st defendant, Mary and Lissy are their children. Yohannan died in the year 2004. Plaint schedule item No.1 property purchased by the plaintiff from her mother Mariyamma by virtue of sale deed No. 3249/2004 of SRO, Thalayolaparambu. The father of the plaintiff was the prior owner of the said property and he had constructed a house therein. The father had executed and registered Will No. 12/2003 of SRO, Thalayolaparambu with respect to his property. As per the Will, Yohannan bequeathed his property to his wife and children. Plaint schedule item No.1 property is the A schedule of the said Will. Prior to the execution of Will, father gave 10 cents of property 300 metres away from the plaint schedule item No.1 property to 1st defendant. In the said property, father had constructed a house and given

to 1st defendant. Plaintiff schedule item No.1 property is lying within well defined boundaries. Plaintiff is residing 10 kilometres away from the plaintiff schedule item No.1 property. The parents of plaintiff were residing in the house situated in the plaintiff schedule item No.1 property. After the death of Yohannan, the mother of plaintiff alone was residing in the said house. Things being so, 1st defendant has decided to reconstruct his house. Then, on the basis of an oral consent of plaintiff, 1st defendant and his family moved on to the house situated in the plaintiff schedule item No.1 property. For the last 6 years they are residing therein. But, 1st defendant with ill-motive sold his property and house. Subsequently, plaintiff orally informed them that the consent given by her was terminated and demanded to vacate the premises. But, they did not concede to her demand. Even though mediators were intervened in the matter, defendants were not ready to vacate the house. Thereafter, plaintiff approached the police as well as the Taluk Legal Services Authority. But, those attempts were become futile. Two years back, defendants

illegally constructed plaint schedule item No.2 shed in the plaint schedule item No.1 property. The valuable trees from the item No.1 property were sold by the defendants and plaintiff sustained a loss in tune of Rs. 60,000/-. Hence, the suit.

3. Brief averments in the written statement are as follows:- The averment that the plaint schedule item No.1 property sold by the mother to plaintiff by receiving consideration is false. The plaint schedule item No.1 property and the house situated therein are in the possession and enjoyment of the defendants. The house situated therein was constructed with the consent of parents who are the prior owners of the property. The averment that, father had executed Will No. 12/2003 is false. The defendants 3 and 4 did not get any property as per the alleged Will. The parents never measured the property and partitioned the same as per the Will. The mother had never received the plaint schedule item No.1 property or possessed the same as alleged. The averment that the father had given 10 cents of property to 1st defendant is false. The property covered by

Will and other properties belonged to Yohannan are partible. The boundary description of the plaint schedule property is incorrect and the property is not identifiable. After the marriage, plaintiff never came to the property and enjoyed the same. 1st defendant and his family are residing in the house situated in the plaint schedule property with the mother. Plaintiff has no right to say that the consent is cancelled. The mother gave the possession of the plaint schedule item No.1 property to 1st defendant and with the permission of the mother he made some permanent constructions therein. For the last 15 years, 1st defendant and his family are living in the said house with the mother. 1st defendant constructed the house in his property with the knowledge and permission of plaintiff and mother. The property given to 1st defendant was sold with the permission of the parents and the said amount was utilised for the needs of parents. Plaintiff obtained the plaint schedule item No.1 property by playing fraud upon the parents. Even though the defendants demanded for partition of the property, plaintiff

was not ready. The averment that the defendants threatened the plaintiff and prevented her from entering on the property is false. Plaintiff has no right to demand to demolish the house constructed by the 1st defendant with the permission of parents and his siblings including plaintiff. The consent given by mother to 1st defendant and his family to reside in the house situated in the plaint schedule property cannot be cancelled. The Will allegedly executed by the father is a forged document. If the Will is proved at any rate, the share of the property of 1st defendant and his siblings are to be measured and set apart from the plaint schedule property. Plaintiff is not entitled to get any relief as prayed for. Hence, defendants prayed to dismiss the suit.

4. Form the rival contentions following issues were settled for trial:-

1. Whether the plaintiff is the owner of the plaint schedule property?
2. Whether the plaintiff is entitled to the declaratory relief as prayed for?

3. Whether the plaintiff is entitled to recover possession of the plaint schedule property?
4. Whether the plaintiff is entitled to get the mandatory injunction as prayed for?
5. Whether the plaintiff is entitled to get the permanent prohibitory injunction as prayed for?
6. Relief and costs?

5. From the side of plaintiff, PW1 to PW3 were examined and Ext. A1 and A2 documents were marked. From the side of defendants DW1 to DW4 were examined and Ext. B1 to B7 documents were marked. That apart, C1, C1(a), C2, C2(a) and Ext. X1 series also marked.

6. Both sides were heard in detail.

7. **Issue Nos. 1 to 5:-** For the purpose of convenience and to avoid repetition these issues are considered together. Plaintiff gave evidence as PW1. She filed proof affidavit in tune with the pleadings in the plaint. According to her, the plaint schedule item No.1 property belongs to her by virtue of Ext. A1 sale deed. The said document was executed by her mother receiving valid

consideration. The mother of plaintiff obtained the property as per Ext. A2 Will executed by her father Yohannan. When the 1st defendant decided to reconstruct his house situated in the 10 cents of property given by the father, plaintiff permitted him to reside in the house situated in the plaint schedule item No.1 property with his family. But, now they are not ready to vacate the premises. Moreover, he has constructed the plaint schedule item No.2 shed in the property and sold the valuable trees. According to plaintiff, she had cancelled the permission given to 1st defendant and his family, they are liable to be evicted. Further, the defendants are to be directed to demolish the item No.2 shed.

8. Per contra, defendants would contend that Ext. A2 Will is a forged document. 1st defendant and his family are residing for the last 15 years in the house situated in the plaint schedule property with the permission of the parents and he made some permanent constructions therein. According to him, the property is partible. But, the plaintiff

was not ready for a partition. Plaintiff obtained Ext. A1 document by playing fraud upon the mother. No property is received by the defendants as per Ext. A2 Will. The parents never physically partitioned the property. The further contention of the defendants is that, Yohannan never executed a Will as claimed by the plaintiff. The plaintiff schedule property is not identifiable since the descriptions in the schedules are misleading. So, defendants would contend that the suit is liable to be dismissed.

9. I have meticulously gone through the oral and documentary evidence adduced from either side. The relationship between the parties is not disputed. It is also not disputed that the plaintiff schedule property belonged to late Yohannan. The defendants challenged the identity of the property. In order, to prove the identity of the property, the petitioner brought two commission reports. Those reports were marked as Ext. C1, C1(a), C2 and C2(a). Ext. C2 and C2(a) are the survey commission report and plan respectively. The plaintiff schedule property is denoted with letters ABCDEFGA in C2 (a) plan. The family house situated

therein is shown in the plan. On perusal of plaint schedule and the plan it can be seen that, the western boundary is different. The plaint schedule item No.2 shed is not situated in the plaint schedule item No.1 property. As per C2(a) plan, the western side boundary is shown as 'thanathu property'. In the evidence of PW1 there is discrepancy in the evidence as to the schedule of property. DW2 Advocate commissioner deposed that there is no physical boundary separating the property of 4th defendant and item No.1 property. Further, he deposed that, survey plan was not provided for measurement. As shown by the plaintiff and defendant, he had identified the property. From the report and deposition of Advocate commissioner, it can be seen that, he measured the property with the help of surveyor on the basis of title document relied on by the plaintiff. Hence, I am of the view that the contention that the property is not identifiable has no due force and only to be discarded.

10. The main challenge made by the defendants is that Ext. A2 Will relied on by the plaintiff is a forged document. It is to be noted that, Ext. A2 Will is a registered

document. According to plaintiff, the plaint schedule item No.1 property obtained by her predecessor in interest on the basis of Ext. A2 Will. On the strength of Ext. A2 Will, her mother sold the plaint schedule item No.1 property to plaintiff by virtue of Ext. A1 sale deed. So, she is claiming title over plaint schedule item No.1 property on the basis of Ext. A1 sale deed. Ext. A2 Will was executed by the father Yohannan in favour of mother Mariyamma. Since the claim of the plaintiff is based on Ext. A2 Will she has to prove the same in terms of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. If, the plaintiff has failed to prove the same, the suit would fail.

11. The learned counsel for plaintiff would argue that, the execution of Ext. A2 Will is proved by the plaintiff in terms of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1881. The learned counsel for plaintiff also would argue that the defendants are estopped from denying the Will. The defendants admitted in their written statement that he had constructed the house with the permission of the plaintiff and mother. Further, the

defendants would contend that the plaint schedule property is not identifiable. The property of Yohannan is lying contiguous and it is partible among his legal heirs.

12. Now, the moot question to be considered is that whether the execution of Ext. A2 Will is proved or not in terms of Section 68 of the Evidence Act. The learned counsel for plaintiff would argue that, in order to prove the execution of Will, plaintiff examined PW2 one of the attesting witnesses. Moreover, the Will is a registered document and its original is produced before the Court. The learned counsel for defendant relying on the decision of the Hon'ble Supreme Court of India in **Rur Singh (D) Th. Lrs. and Others v. Bachan Kaur** reported in **2009 KHC 4382** would argue that the execution of Ext. A2 Will is not proved in terms of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

13. It is to be noted that, the formalities for attestation is contemplated under Section 63 of the Indian Succession Act, 1925 is confined to the execution of a Will

and not for its registration. A Will is not a compulsorily registrable document. In fact, registration has no importance at all; whereas, registration may result in some sort of added credibility on the proof of its execution. (**See Bindu K.C. and Another v. Leela Kollandi and Others** reported in **2017 KHC 272**). So, I am of the view that the contention of the learned counsel for plaintiff that Ext. A2 Will is a registered document will not help the plaintiff from dispense with the proof of execution of Will.

14. It is well settled that the execution of a Will shall be proved in terms of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. It is a trite law that, it is for the propounder of the Will to prove the genuineness of the Will and to dispel all the suspicious circumstances exist in the execution of Will. As per Section 68 of the Indian Evidence Act, 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.

15. In the decision **Rur Singh (D) Th. Lrs and Others v. Bachan Kaur** (Supra) the Hon'ble Supreme held that, to say Will has been duly executed the requirement mentioned in clauses (a), (b) and (c) of Section 63 of the Indian Succession Act, 1925 are to be complied with.

16. In the above decision, the Hon'ble Supreme Court further held that, *"In a way, S.68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under S.63 of the Indian Succession Act, 1925. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of S.63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove*

there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under S.63 of the Indian Succession Act, 1925. Where one attesting witness examined to prove the will under S.68 of the Indian Evidence Act, 1872 fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of S.68 of the Indian Evidence Act, 1872."

17. Here in this case, PW2 deposed that, he was working as an assistant in the office of a scribe named Narayanan and he has signed in Ext. A2 document as per the

direction of Narayanan. In cross examination, he deposed that he did not know how many persons signed in Ext. A2. He had not seen any of the persons including the testator signing Ext. A2. PW2 did not even know the testator. Moreover, he deposed that he came to know that Ext. A2 is a Will only when the plaintiff informed him. In cross examination, plaintiff deposed that she saw the Will for the first time in the year 2020 and the same was handed over by the mother to plaintiff. So, I am of the view that the above discussed evidence is not sufficient to prove Ext. A2 Will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act . The other attesting witness was not examined before the court.

18. Apart from the above, the plaintiff deposed that as per Ext. A2 Will she has also got 2 cents of property. But, the same is not yet set apart or mutated in her name. It is also pertinent to note that, on 08.06.1987 Yohannan and Markose executed Ext. B2 document with respect to 10 cents of property in the name of plaintiff and her husband Benchamin. The said property was obtained by Yohannan by

virtue of Ext. B4 settlement deed. Subsequently, the property covered by Ext.B2 was transferred in the name of 1st defendant jointly by Yohannan, plaintiff and her husband. But, while she was in the witness box she denied the same. It is also pertinent to note that the said fact is seen conspicuously absent in the plaint. In cross examination, PW1 deposed that she wants the prize of the plaint schedule property. Moreover, during cross examination plaintiff deposed that the defendants were started to live in the house situated in the plaint schedule property with the permission of the mother also.

19. Form the discussions made above, it can be seen that plaintiff has failed to prove Ext. A2 Will in terms of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1881. As I have already discussed above, without proving the execution of Ext. A2 Will, plaintiff could not succeed her case. So, I am of the view that the plaintiff has not succeeded in proving her case and suit is liable to be dismissed. These issues are answered accordingly against the plaintiff.

20. **Issue No.6:-** In the result, the suit is dismissed.

No costs.

Dictated to Confidential Asst., transcribed and typed by her, corrected and pronounced by me in the open Court on this the 06th day of July, 2023.

**Sd/-
ATHEEK RAHMAN
MUNSIFF**

APPENDIX:-

Exhibits Marked for the Plaintiff :-

- A1 : 02.12.2004 : Certified copy of sale deed
No. 3249/2004 of Thalayolaparambu
S.R.O.
- A2 : 10.02.2003 : Will deed No.12/2003 of
Thalayolaparambu S.R.O.

Exhibits Marked for the Defendants:-

- B1 : 16.11.2017 : Village Officer report received from
Village Office Mulakkulam as per
RTI Act, No. RTI 49/17-18
- B2 : 08.06.1987 : Certified copy of Gift deed No.
1386/1987 of Thalayolaparambu
S.R.O.
- B3 : 13.09.1975 : Certified copy of sale deed
No.4199/1975 of Kaduthuruthy
S.R.O.

- B4 : 14.09.1982 : Certified copy of settlement deed No.2333/1982 of Thalayolaparambu S.R.O.
- B5 : 03.10.1983 : Certified copy of sale deed No.2333/1983 of Kaduthuruthy S.R.O.
- B6 : 19.02.2019 : Abstract of Admission Register of Government L.P.S., Peruva.
- B7 : 05.08.1999 : Certified copy of sale deed No.2293/1999 of Thalayolaparambu S.R.O.

Court Exhibits :-

- C1 : 08.01.2018 : Commission report filed by Adv. P.S. Vishnu
- C1(a) : 08.01.2018 : Rough sketch prepared by Advocate Commissioner is attached with the C1
- C2 : 30.06.2022 : Survey commission report filed by Adv. P.M. Sudarsanan.
- C2(a) : 30.06.2022 : Survey plan prepared by Surveyor P. D. Rajaram.

Third Party Exhibits:-

- X1 : 21.11.2022 : Letter No.320/2022 issued by Village Officer Mulakkulam.
- X1(a) : 21.11.2022 : Attested copy of Thandaper No.2283 of Mulakkulam Village Office.
- X1(b) : 21.11.2022 : Attested copy of Thandaper page of Mulakkulam Village Office.

Witness Examined for the Plaintiff :-

PW1	09.11.2022	Alice.
PW2	15.11.2022	Suresh Kumar.
PW3	18.11.2022	Adv. P.S.Vishnu.

Witness Examined for the Defendants:-

DW1	22.11.2022	Sumithra N.P.
DW2	22.11.2022	Adv. P.M. Sudarsanan.
DW3	15.02.2023	Joy. T.Y.
DW4	02.03.2023	P.D. Rajaram.

Id/-
MUNSIFF

// True Copy //

Copied by :-
Comp. by:-

Sd/-
ATHEEK RAHMAN
MUNSIFF

**Copy of Judgment in
OS.54/2017
Dated : 06.07.2023.**