

**IN THE COURT OF THE SUB JUDGE, NEDUMANGAD
PRESENT: SMT. PRASANNA.K., SUB JUDGE
WEDNESDAY 23rd MARCH, 2022/2nd CHAITHRA 1944**

(Appeal against the judgment and Decree dated: 31.10.2018 in
OS.648/2008 of the Prl. Munsiff's Court, Nedumangad)

CASE NO. AS. 15/2019 and AS.18/2019

AS.No.15/2019

Appellants(7 and 8 Defendants and Counterclaim Plaintiffs):-

1. Maheen, aged 60, S/o Hasanaru Pillai, Rajeena House,
Kuttichal, Mannoorkara Village, Nedumangad,
Thiruvananthapuram.
2. Rajeena, aged 35, D/o Ramla Beevi, Rajeena House,
Kuttichal, Mannoorkara Village, Nedumangad,
Thiruvananthapuram.

By Adv. : Sri. A. Mohammed Iqbal.

**Respondents(Plaintiff and other defendants and counter claim
defendants):-**

1. Premalatha, aged 59, D/o Devaki, residing at V.V.
Bhavan, Poochedivila, Kattakada, Poonjamcode Muri,
Kattakada.P.O., Perumkulam Village, Kattakada Taluk.
(Original Plaintiff/Counterclaim 1st defendant).
2. Selvam, aged 66, S/o Arumugham, Puthenkada Veedu,
Odankuzhy, ORAH-199, Thirumala Village,
Thiruvananthapuram. (Original Plaintiff/Counterclaim 2nd
defendant).
3. Sivaprasad, aged 37, S/o Selvam, Puthenkada Veedu,
Odankuzhy, ORAH-199, Thirumala Village,
Thiruvananthapuram.

4. Ganesh, aged 39, S/o Arumugham, Puthenkada Veedu, Odankuzhy, ORAH-199, Thirumala Village, Thiruvananthapuram.
5. Vijayakumar, aged 35, S/o Arumugham, Puthenkada Veedu, Odankuzhy, ORAH-199, Thirumala Village, Thiruvananthapuram.
6. Padmakumar, aged 33, S/o Arumugham, Puthenkada Veedu, Odankuzhy, ORAH-199, Thirumala Village, Thiruvananthapuram.
7. Udayamma, aged 75 years, D/o Devaki, Roadarikathu Veedu, Pulimoodu, Aryanad, Uzhamalackal Village, Nedumangad.
8. Chandrika, aged 64 years, W/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
9. Vinod Chithu, aged 45 years, S/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
10. Resmeendra, aged 40 years, D/o Chandrika, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
11. Suprabha, aged 38, D/o Chandrika, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
12. Suhurth Raj, aged 36 years, S/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
13. Udayakumar, aged 48 years, S/o Gopalakrishnan, Dwaraka, Paruthipally, Paruthippally.P.O., Kokkudi Muri, Mannoorkara Village.
14. Divithlal, aged 38, S/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal

Village from Kunnilvilakathu Veedu, Poonjakkottu Muri, Perumkulam Village, Kattakada.

15. Suja, aged 40, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village from Kunnilvilakathu Veedu, Poonjakkottu Muri, Perumkulam Village, Kattakada.
16. Subha, aged 50, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village from Kunnilvilakathu Veedu, Poonjakkottu Muri, Perumkulam Village, Kattakada.
17. Ambili, aged 45, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village from Kunnilvilakathu Veedu, Poonjakkottu Muri, Perumkulam Village, Kattakada.
18. Rejitha, aged 42, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village from Kunnilvilakathu Veedu, Poonjakkottu Muri, Perumkulam Village, Kattakada.

By Adv. Sri. V.A. Baburaj(R1)

By Adv. Sri. R.B. Muralimohana Kumar (R2 to R7)

By Adv. Sri. P. Sreekumar(R8 to R10)

By Adv. Sri.Kolliyacode. V. Suresh(R13)

Respondent 11, 12, 14 to 18- No Vakalath

AS.No.18/2019

Appellants/Additional defendants 9 to 13

1. Chandrika, aged 67, Vinod Bhavan, Paruthipally, Kokkudi Muri, Mannoorkkara Village.

2. Vinod Chith, aged 44, S/o Sadasivan, Vinod Bhavan, Paruthipally, Kokkudi Muri, Mannoorkkara Village.
3. Resmeendra, aged 42 years, D/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
4. Suprabha, aged 38, D/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.
5. Suhurth Raj, aged 37, S/o Sadasivan, Vinod Bhavan, Paruthippalli, Kokkudi Muri, Mannoorkara Village.

By Adv. Sri. P. Sreekumar

Respondents/Plaintiff and Defendants 1 to 8 and Addl. Defendants 10 and Counterclaim Defendants:

1. Premalatha, aged 54, D/o Devaki, V.V. Bhavan, Poochedivila, Kattakkada.P.O., Perumkulam Village.
2. Selvan, aged 66, S/o Arumugham, Puthenkada, Odankuzhi, ORAH-199, Thirumala, Thirumala Village, Thiruvananthapuram. (Died)
3. Sivaprasad, aged 37, S/o Selvan, Puthenkada, Odankuzhi, ORAH-199, Thirumala, Thirumala Village, Thiruvananthapuram.
4. Ganesh, aged 39, S/o Arumugham, Puthenkada, Odankuzhi, ORAH-199, Thirumala, Thirumala Village, Thiruvananthapuram.
5. Vijayakumar, aged 35, S/o Arumugham, Puthenkada, Odankuzhi, ORAH-199, Thirumala, Thirumala Village, Thiruvananthapuram.
6. Padmakumar, aged 33, S/o Arumugham, Puthenkada, Odankuzhi, ORAH-199, Thirumala, Thirumala Village,

Thiruvananthapuram.

7. Udayamma, aged 74 years, D/o Devaki, Muthuvandalkuzhi, Roadarikathu Veedu, Pulimoodu, Aryanad, Uzhamalackal Village.
8. Maheen, aged 59, S/o Hasanaru Pilla, Rajeena Sadanam, Kuttichal, Mannookara Village.
9. Rajeena, aged 34, D/o Maheen, Rajeena Sadanam, Kuttichal, Mannookara Village.
10. Udayakumar, S/o Gopalakrishnan Nair, Nayanandanam, Thirumankuzhi, Pazhayatheruv Muri, Aryanand.
11. Divithlal, aged 42, S/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village.
12. Suja, aged 55, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village.
13. Subha, aged 53, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village.
14. Ambili, aged 50, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village.
15. Rajitha, aged 47, D/o Udayamma, Muthuvandankuzhi, Roadarikathu Veedu, Chittuveettu Muri, Uzhamalakkal Village.

(R2 is died and R3 to R6 are recorded as the Legal Heirs of R2 as per order dated 05/10/2021 on IA.02/2021)

By Adv. Sri.Koliyacode. V. Suresh(R10)

By Adv. Sri.Muhammed Iqbal (R8, R9)

By Adv. Sri. R.B. Muralimohana Kumar (R2 to R7)

By Adv. Sri. V.A. Baburaj(R1)

R11 to R15 - No Vakalath

This Appeal suits having been finally heard on 23/03/2022, the court, on the same day delivered the following.

COMMON JUDGMENT

AS.No.15/2019 is an appeal filed by the defendants No.7 and 8 and AS.No. 18/19 is an appeal filed by the additional defendants No. 9 to 13 in O.S.No. 648/2008 on the file of the Principal Munsiff's Court, Nedumangad.

2. As the aforesaid both appeals are preferred against the Judgment and decree in the same suit (O.S.No. 648/08), both these appeals are considered, heard and disposed jointly.

3. The appellants in AS.No.15/19 are the defendants No.7 and 8 and the respondents No.2 to 13 therein are the plaintiff, defendants No.1 to 6 and additional defendants No.9 to 14, respectively, and the appellants in AS.No.18/2019 are the additional defendants No. 9 to 13 and the respondents No.1 to 10 therein are the plaintiff, defendants No. 1 to 8 and additional defendants No. 14, respectively, in the aforesaid suit, O.S.No. 648/2008. So for the sake of convenience the parties shall be referred in

this judgment as to their respective status in the said suit (O.S.No. 648/2008).

4. The plaintiff filed the suit (OS.No. 648/08) for declaration of title over the plaint A schedule property, for recovery of the said property and for putting up of its northern boundary, against the defendants (defendant No. 1 to 8 and additional defendants No.9 to 14).

5. The defendants No.1 to 5 filed written statement with counterclaim for putting up of southern and northern boundary of the counter claim A schedule property, for recovery of possession and for injunction, against the counter claim defendants No. 1 to 10 (plaintiff, defendants No. 6 to 8 and additional defendants No. 1 to 14).

6. The defendant No.6 filed written statement with counter claim for injunction against counter claim defendants No. 1 to 13 (plaintiff, defendants No. 1 to 5, 7, 8 and additional defendants No. 9 to 13).

7. The defendants No.7 and 8 filed written statement with counter claim for recovery of possession of counter claim A schedule property and for putting up of boundary of counter claim A, B and C schedule properties, against counter claim defendants No. 1 to 18 (Plaintiff, defendants No. 1 to 6, additional defendants No. 9 to 14 and 5 others).

8. The additional defendants No.14 filed written statement with

counter claim for recovery of possession of counter claim schedule property against counter claim defendants No. 1 to 19 (Plaintiff, defendants No. 1 to 8, additional defendants No. 9 to 13 and 5 others).

9. The statements of the plaintiff in her affidavit, in brief, are as follows:- The plaintiff is the owner in possession of the plaint A schedule property by virtue of Will deed No. 4/1966 of SRO, Aryanad, which is item No.3 in 'F' Schedule in the Will deed. The defendants 1 to 5 are the legal heirs (husband and children) of late Krishnamma, a sister of plaintiff. The 6th defendant is another sister of the plaintiff. The 8th defendant is the daughter of the 7th defendant. On the northern side of the plaint A schedule property there lies the property of Late Krishnamma and adjacent to the said property there lies the property of the 6th defendant. The property of these defendants are scheduled as plaint B schedule property. There is a rubber plantation in the plaint A schedule property. The plaintiff is residing far away from this property. Taking advantage of this situation, the defendants 6 to 8 made an attempt to destroy the manthirana boundary on the northern side of the plaint A schedule property. The plaintiff rushed to the spot and prevented the illegal attempt. The plaintiff has no other way than to approach the court to redress her grievances. Since the defendants No. 7 and 8 claimed some right over the plaint A schedule

property, it will create a cloud over the title of the plaintiff. Hence the plaintiff is praying for a declaration of title over the plaintiff A schedule property. If the court found that the defendants are in possession of the plaintiff A schedule property, recovery may be allowed on the strength of title.

10. The defendants No.1 to 5 jointly filed written statement with counter claim for putting up of boundary, recovery of possession and for injunction contending as follows:- The defendants 1 to 5 are legal representatives of late Krishnamma, the sister of plaintiff. The 1st defendant is the husband and the defendants 2 to 5 are the children of Krishnamma, D/o. Devaki. The said Krishnamma obtained title over the counterclaim A schedule property as item No 3 in D schedule in Will deed No. 4/1966 of SRO Aryanad. The said Krishnamma filed O.S.No. 1532/92 before the Sub Court, Thiruvananthapuram, when the 6th defendant and one Sadasivan, the brother of Devaki, attempted to trespass in to the counter claim A schedule property. As per the decree in O.S.No. 1532/92, manthirana boundary was put up by the parties separating the property of the 6th defendant and the property of the defendants No. 1 to 5. Thereafter, the counter claim defendants are trying to grab the counterclaim A schedule property by creating forged documents. The decree in O.S.No.

1532/92 is binding on the counter claim defendants. On 27.08.2008, the counter claim defendants tried to trespass in to the counter claim A schedule property, but the same was defeated by the counter claim plaintiffs. The counter claim plaintiffs are residing in Tamil Nadu. On 27.09.2013, some of the counter claim defendants encroached into the counter claim A schedule property and started to reside in the house situated therein. The property of the 1st counter claim defendant lies on the southern side of the counter claim A schedule property. The properties of other counter claim defendants are on the northern side of the counter claim A schedule property. Counter claim plaintiffs are seeking decree of recovery of possession and putting up of boundary on the northern side of the counter claim A schedule property.

11. The plaintiff/ the 1st counterclaim defendant filed written statement to the counterclaim filed by the defendants No. 1 to 5 contending as follows:- There is no cause of action to file this counterclaim. This counter claim is filed so as to defeat the right of the plaintiff over the plaint A schedule property.

12. The defendants No. 7 and 8 filed written statement to the counter claim filed by defendants No. 1 to 5 contending as follows:- The parties to the Will deed hadn't obtained possession of the property as stated

in the Will. The counterclaim plaintiff hadn't obtained property as per the Will deed. The defendants 7 and 8 were not parties in OS.No.1532/1992. The said suit is not with regard to the property in this case and the decree in the said case is not binding upon the defendants 7 and 8. The defendants 7 and 8 are the bonafide purchasers of the plaint schedule property. Plaintiff has never got right or possession over the schedule property. So the counter claim may be dismissed.

13. The 6th defendant filed written statement with counter claim contending as follows: The sixth defendant and her deceased husband obtained 3 acres of land as item No.5 in Will deed No.4/1966. She alienated 2.5 acres of property on the northern side of this property to third parties. The remaining 50 cents of property is in the possession and enjoyment of the sixth defendant. The Adv. Commissioner identified the said property as plot EDYZ in the plan. The plaintiff is trying to create a cloud on the title of the 6th defendant and trying to grab the property. The counter claim defendants made such an attempt on 03.08.2016. Hence, this counter claim plaintiff/the 6th defendant filed this counter claim for permanent prohibitory injunction to restrain the counter claim defendants from trespassing into the counter claim schedule property or interfering with her possession and enjoyment of the above property.

14. The Plaintiff filed written statement to the above counterclaim stating that there is no cause of action to institute the counterclaim and that the counterclaim plaintiff/the defendant No.6 filed this counterclaim so as to defeat the claim of the plaintiff.

15. The Defendants 7 and 8 filed written statement to the counterclaim filed by the 6th defendant contending that they are the purchasers of property from the 6th defendant. Therefore their right is to be adjudicated prior to the execution of decree, if any, in favour of the sixth defendant. So the counterclaim of the sixth defendant may be dismissed.

16. The defendants No. 7 and 8 filed written statement to the plaint with counter claim and additional written statement contending as follows:- The 8th defendant is the daughter of the seventh defendant. The 7th defendant purchased the property from the sixth defendant for valuable consideration as per sale deed No.145/1994. He transferred the property to the 8th defendant as per settlement deed No.951/2004. The 7th and 8th defendants are in possession of the counterclaim A schedule property having an extent of 1 acre 50 cents. They have made improvements worth Rs. 15,00,000/- in the property and planted rubber trees therein. The plaintiff or the first defendant never took possession of the schedule properties allotted to them by virtue of Will deed No.4/1966. They are

trying to usurp the property from the defendants 7 and 8 by taking advantage of the errors and discrepancies crept in the Will deed regarding the extent of properties and survey numbers. Even if, there is mistake about the documentary location of the property, they have obtained the title over the property in their possession through adverse possession and limitation. If the plaintiff proves that the plaintiff got the property as per the Will deed and that the said property is in possession of the defendants 7 & 8 and if the court finds that counterclaim A schedule property is to be handed over to the plaintiff, the defendants 7 & 8 shall be provided with 1.50 Acres out of the 3 acres of property allotted to Udayamma as B schedule in the Will deed, excluding the northern 1 acre portion, and they must be permitted to put up boundary between counterclaim schedule properties.

17. The plaintiff filed written statement to the counterclaim filed by the 7th and 8th defendant contending that 5 acre 58 cents of property in Sy.No. 2393/3-1, which includes plaintiff schedule property and counter claim schedule property were originally belonged to the grandparents of the plaintiff (Chukran Padmanabhan and Chakki Lekshmi). They jointly executed Will deed No. 4/1966. The plaintiff obtained ownership over 1.08 acres of land as F schedule in the said Will deed and the said property

is in possession and enjoyment of the plaintiff. If counterclaim plaintiffs obtained property from Udayamma, they can claim property from B schedule in the Will. The 6th defendant has no right to transfer the property of the plaintiff to the 7th or 8th defendant. None of the prayer in the counter claim is allowable.

18. The additional defendants 9 to 13 filed written statement to the plaint contending as follows:- The additional defendants 9 to 13 got no property by virtue of Will deed No.4/1966. The additional defendants 9, 12 and 13 have no property in Aryanadu village. The additional defendants 10 and 11 got 3 acres 11 cents of land in Aryanadu village by virtue of partition deed No.1091/2000. But the said property is not the property coming under Will deed No. 4/1966. So the suit may be dismissed with cost of these defendants.

19. The additional defendant No. 14 filed written statement to the plaint, to the counter claim filed by the defendant No. 1 to 5 and to the counter claim filed by the defendants No. 7 & 8, with counter claim for recovery of possession contending as follows:- The additional 14th defendant purchased the counter claim C schedule property (40.48 Ares of property in Re-Sy No. 458/3-6 of Aryanad Village) from Vinu and Jiji by virtue of sale deed No. 3221/2004, who obtained the property from one

Sadasivan by virtue of settlement deed No. 2980/1996, that the said Sadasivan got the above property from the daughter and son-in-law of the 6th defendant by virtue of Sale deed No.1926/1995 and that the 6th defendant got the property by virtue of Will deed No. 4/1966. The additional 14th defendant has constructed a residential building in the property by spending Rs. 50 lakhs and residing therein. None of the other parties has possession or right over the above property. The original plaintiff filed this suit with regard to the property in possession of the 14th defendant, without arraying him as a party to the suit. He came to know about the filing of the suit only in the year 2013. Thereafter he consulted with the defendants 1 to 5 and they informed him that there occurred mistake while taking possession of the property described in Will deed No. 4/1966. But the additional 14th defendant believes that the said statement is not correct and that the property in his possession is the property given to his predecessor himself as per the Will deed. If it is found that he is holding any property by mistake, the property as per his title deed should be recovered from the possession of the original plaintiff and defendants for which he filed this counterclaim.

20. The plaintiff filed written statement to the counter claim filed by the additional 14th defendant stating that the plaint schedule property

absolutely belongs to the plaintiff and the counterclaim plaintiff (the additional 14th defendant) has no right over the said property. There is no cause of action to file such a counterclaim.

21. The 1st defendant filed written statement to the counter claim filed by the additional 14th defendant contending that the counter claim is not maintainable and is filed without any bonafide and so the counter claim is to be dismissed.

22. The defendants 7 and 8 filed written statement to the counter claim filed by the additional 14th defendant contending that it is not possible to identify which property the 14th defendant meant by his counter claim. No such land is lying there separately. The said defendant has got no property at the spot, as per the deed relied on by him. The counter claim filed by the additional 14th defendants is not maintainable.

23. On the basis of the pleadings, the lower court framed the following issues for determination.

1. *Is the plaintiff entitled to a decree for declaration as prayed for?*
2. *Is the plaintiff entitled to a decree for recovery of possession as prayed for?*
3. *Is the plaintiff entitled to a decree for putting up of boundary as prayed for?*
4. *Is the plaintiff entitled to a decree for permanent prohibitory injunction as prayed for?*

5. *Whether the defendants 1 to 5 are entitled to recover counter claim schedule property as prayed for?*
6. *Whether the defendants 1 to 5 are entitled to a permanent prohibitory injunction as prayed for?*
7. *Whether the defendants 1 to 5 are entitled to get a decree for putting up boundary as prayed for?*
8. *Whether the 6th defendant is entitled to a permanent prohibitory injunction as prayed for?*
9. *Whether the defendants 7 and 8 are entitled to a decree for recovery of possession as prayed for?*
10. *Whether the defendants 7 and 8 are entitled to a decree for putting up of boundary separating counter claim A schedule and B schedule properties?*
11. *Whether the 14th defendant is entitled to a decree for recovery of possession as prayed for?*
12. *What is the order as to costs?*

24. During trial before the lower court, PW1 was examined and Ext.A1 was marked, on the side of the plaintiff. DW1 to DW3 were examined and Ext. B1 to B6 were marked, on the side of the defendants. Exts.C1, C1(a), C1(b), C2 and C2(a) were marked as court Exhibits.

25. After hearing both sides and on appreciation of evidence, the Principal Munsiff's Court dismissed the counter claim filed by the 6th defendant and partly decreed the suit and counter claim filed by the defendants No. 1 to 5, 7, 8 and 14.

26. Aggrieved by the aforesaid Judgment and decree dated 31.10.2018 the defendants No. 7 and 8 filed AS.No.15/2019 and additional defendants No. 9 to 13 filed A.S.No. 18/2019, before this court.

27. The grounds stated in the memorandum of appeal in A.S.No. 15/2019, in brief, are as follows:- The lower court failed to understand that the property under Will deed No.4/1966 are mispossessed by the legatees at different locations varying with documentary location. The court ought to have understood that, even though the sale deed in favour of the appellants was for 1 Acre 50 cents on the north of 5 Acre 58 cents of land, actually the land delivered to the appellants and possessed by them was 1 acre 76 cents on the south of 5 acre 58 cents and it was mislocation of possession. The court did not consider the measured plan and report of the commissioner showing the rubber cultivation in 1 Acre 76 cents of land and its clear boundaries separating the other properties, which shows that 1 acre 8 cents claimed by the plaintiff as per the Will deed is lying within 1 Acre 76 cents of land possessed by the defendants No. 7 & 8. The defendants 7 & 8 had filed a counter claim that if at all 1 acre 8 cents are allotted to the plaintiff from the 1 acre 76 cents in possession of the defendants No. 7 & 8, they may be given 1 Acre 50 cents of land from the location specified in their sale deed, which is in possession of other

defendants as mislocated possession. The trial court lost sight of the fact that each defendants who got right over the 5 are 58 cents of land as per their respective title deeds are actually not holding the property in the location specified in their title deeds, but in different locations and that is why the defendants who are holding land at different locations prayed for getting back their property as per their title deeds. The trial court wrongfully came to a conclusion that the plaintiff is in possession of her 1.08 Acres of land as per her title deed description. The court ought to have found that Udayamma (the 6th defendant) and her husband Bhoopalan had taken possession of the 3 acres of property at a different place than stated in Will deed No. 4/1966, even before the death of the testators and they have sold away 1 acre from 3 acres to strangers and then sold 1 acre 50 cents on the south of the said 1 acre to the appellants and the unsold 50 cents are on the south of 5 Are 58 cents, which is at a different location than in the title deed. Since the 1 acre 76 cents of property including the property claimed by the plaintiff is in possession the 7th and 8th defendants, the plaintiff claimed a relief of recovery of possession based on her title. The lower court did not consider the value of improvements done by the appellants, which the court is empowered to allow even without a separate prayer for it. The trial court ought to have taken into

consideration that irreparable injury and loss will be caused to the defendants 7 and 8, if the counter claim for recovery of possession is not allowed. The trial court did not consider the benefit to be given to the appellants as bonafide purchasers, eventhough the property delivered by the seller Udayamma and others are in a different location than stated in the deed. So the decree and judgment of the lower court may be modified or remand the case to lower court for fresh disposal.

28. The grounds stated in the memorandum of Appeal in A.S.No. 18/2019, in brief, are as follows:- The plaintiff and defendants No. 1 to 8 and 14 colluded together and obtained a decree and the said decree is unsustainable in law. The trial court ought to have found that Ext.A1 Will deed is not proved and legal formalities not complied with. The plaintiff and defendants 1 to 8 and 14 colluded together and admitted execution of Ext.A1 with a malafide motive. The court below ought to have insist other evidence to prove Ext.A1. The plaintiff and defendants are not entitled to claim any right under Ext.A1. The plaintiff has no title or possession over the plaint A and B schedule properties. The 5 Acres 58 cents is the only property that belongs to the testators. Sukumaran Padmanabhan and Chakki Lakshmi executed documents believing that 3 acres 11 cents of property is included in Old Re-survey 2380 and 2382.

Chakki Lakshmi and Sadasivan jointly executed settlement deed No. 2856/91 in favour of Vasudevan. Vasudevan executed Will deed No. 28/94 in favour of appellants and others with respect to 3 acres 11 cents in Sy.No. 459/3 in block No.47, but in this deed the corresponding old number is mistakenly stated as Sy.No. 2382 and 2380. The court below ought to have found that out of the properties included in Ext.A1, northern 3 acres 11 cents were alienated to the appellants, during the life time of the testators, and so the legatees did not get title and possession over that property and thus Ext.A1 is invalid to the extend of property included in the settlement deed. The trial court wrongly found that they are in possession of the property and failed to enter into a finding about the title of the 14th defendant and passed a wrong decree in his favour allowing recovery of possession. The observation that the appellants were not properly representing is wrong. The appellants beg for adducing fresh evidence and may be permitted to produce further documents. So the court may dismiss the suit and counterclaims and remand the case to the lower court for trial denova.

29. Heard the plaintiff, defendants No.1 to 5 and 7 to 14. Other defendants not turned up to argue the matter.

30. The Following points are raised for determination.

- (i) Are there any grounds to interfere with the judgment and decree of the trial court?
- (ii) What shall be the proper order as to costs?

Point No.(i)

31. The plaintiff, the defendants No.1 to 8 and the additional defendant No.14 claims right over their respective properties under Will deed No. 4/1966. Each of them claims right over portions of 5.08 Acres of property covered by Will deed No. 4/1966. An attested copy of the said Will deed No. 4/1966 was got marked by the plaintiff as Ext.A1.

32. The case of the plaintiff is that she is the owner in possession of 1.08 Acres of property as item No. 3 in 'F' schedule in Ext.A1, which is scheduled as the plaintiff A schedule property. The case of the defendants No. 1 to 5 is that they are the legal heirs of Late Krishnamma and the said Krishnamma got 1 acre of property as item No. 3 in D schedule in Ext.A1, which is scheduled by them as counter claim A schedule property. The case of the 6th defendant is that she along with her husband got 3 acres of property as item No.5 in Ext.A1. Thus according to the plaintiff and defendants No. 1 to 6, they got their respective properties by virtue of Will deed No. 4/1966(Ext.A1).

33. The case of the defendants No. 7 and 8 is that they are the purchasers of 1.50 Acres of property, out of the aforesaid 3 acres of

property obtained by the 6th defendant by virtue of Will deed No. 4/1966 (Ext.A1). The case of the defendants No.14 is that he purchased 40.48 Ares of property from Vinu and Jiji, who obtained the said property from Sadasivan; that the said Sadasivan obtained the property from the daughter and son-in-law of the 6th defendant; that the said daughter and son-in-law got the property from the 6th defendant and that the 6th defendant got the said property by virtue of Will deed No. 4/1966 (Ext.A1).

34. Thus according to the defendants No.7 and 8 and additional defendant No.14, the prior title deed of the property obtained by them is Will deed No.4/1966. That is, the defendants No.7, 8 and additional defendant 14 claimed that they got title over the portions of the aforesaid 3 acres of property that the 6th defendant got by virtue of Ext.A1.

35. On going through the case of the plaintiff and defendants, it can be seen that the plaintiff and all the defendants, except the additional defendants No. 9 to 13, in the suit claim right and title over the properties claimed by them, under Ext.A1 and that none of the defendants, in their written statement, disputed the execution of Ext.A1.

36. The appellants in AS.No. 18/2019 mainly challenged the decree and judgment of the trial court for the reason that Ext.A1 was not proved as mandated under section 68 of the Evidence Act and contended that the

plaintiff and defendants No. 1 to 8 and 14 colluded together and admitted the execution of Ext.A1 and that the plaintiff and the defendants are not entitled to claim any right under Ext.A1.

37. Ext.A1 is an attested copy of Will deed No. 4/1966. As I already stated above, the plaintiff, defendants No. 1 to 8 and 14 claimed right over the properties under Ext.A1. There is no dispute that a Will is a document which is required by law to be attested and thereby attracting the main part of S.68 of the Indian Evidence Act, 1872. S.68 of the Act reads as follows:-

*“ 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.”

Therefore the questioned document (Ext.A1) being a Will required by law to be attested, it shall not be used as evidence until one attesting witness

atleast (if he be alive) has been called for proving its execution. But in this case admittedly none of the attesting witnesses to the Will were examined to prove Ext.A1.

38. The learned counsel for the plaintiff contended that none of the parties to the suit disputed the marking of Ext.A1, during trial stage, and no one challenged the execution of Ext.A1 in their written statement. The learned counsel contended that in the absence of any specific denial of execution and attestation of Ext.A1 in the written statement of the defendants, further proof of Ext.A1 is not expected and that, when admission regarding due execution of the Will is admitted, it should be accepted under section 58 of the Evidence Act and there is no need of its proof as provided under section 68 of the Indian Evidence Act.

39. The learned counsel for the appellants in AS.No.18/2019, on the other hand, contended that the document in question being a Will, it is to be proved in accordance with the mandate under section 68 of the Evidence, before accepting it as evidence and no exception has been carved out for a Will which is not specifically disputed or expressly admitted and that Ext.A1 Will cannot be used in Evidence for want of proof.

40. Now the main question that come up for consideration in these

appeals is “ Whether it is necessary for the plaintiff to prove the Will as per S. 68 of the Indian Evidence Act, even if its execution is admitted or not expressly denied.

41. This question was come up for consideration before the Division Bench of the Hon'ble High Court of Kerala, in 2017 (2) KLT 327(Sarada and other V/S Radhamani and other). In para No.13 of the aforesaid decision, the Hon'ble High Court held that,

“ However the proviso to S.68 of the Act carves out an exception for documents which though required by law to be attested can nevertheless be proved without examining one attesting witness atleast if he be alive. The benefit of the proviso is applicable to all such documents (not being a Will) whose execution by the person by whom it purports to have been made is not specifically denied. The only other condition is that the document required by law to be attested must have been registered in accordance with the provisions of the Indian Registration Act, 1908. The category of documents styled as Will under S.2(h) of the Indian Succession Act, 1925 are specifically excluded from the ambit of the proviso to S.68 of the Act. The necessary corollary therefore is that a Will shall not be used as evidence until one attesting witness atleast has been examined even if its execution is not specifically denied”.

The Hon'ble High Court further held that in para No.16 in aforesaid decision that,

“ There is a world of difference between the factum of a document akin to the Will being admitted under S.58 of the Act and proof of due execution of the Will under S.68 of the Act. The due execution of the Will cannot be proved otherwise than by recourse to S.68 of the Act and S.63 of the Indian Succession Act, 1925 as has been held time and again. The general provisions of S.58 of the Act has obviously to give way to the special provisions of S.68 of the Act which govern documents required by law to be attested. That some documents are required by law to be attested imply that law gives additional solemnity empowering the executants with rights and obligations thereunder. S.68 of the Act operates as an exception in relation to documents required by law to be attested and cannot be said to be subject to S.58 of the Act by any stretch of imagination. No distinction has been drawn by the statutory provision between an 'admitted Will' and a 'disputed Will' as has been rightly observed by Mr. Justice P. Bhavadasan in Poulose A. V.'s case (supra). One of the attesting witnesses if he be alive should be called for the purpose of proving its execution whenever a Will is used as evidence and for whatever purpose.”

So in view of the above decision of the Hon'ble High Court, it can be concluded that even if the Will is not disputed the Will is to be proved as per S.68 of the Indian Evidence Act. But in this case the trial court admitted the Will in evidence without examining any of the attesting witness as provided under section 68 of the Evidence Act. In the judgment

under challenge, the trial court admitted Ext.A1 in Evidence observing and holding that *“summons were issued to the attesters of Ext.A1 which were returned stating that the witnesses are no more. Therefore, the Will is admitted in evidence considering the other surrounding circumstances especially its unanimous acceptance by the parties to the suit.”* From the aforesaid observation, it can be inferred that the attesters of the Will are not alive at present and so the examination of the witness as provided under section 68 of the Evidence Act was not done during trial of the case. If no attesting witnesses are available to prove the Will under section 68 of the Evidence Act, the execution of the Will can be proved by the other evidence having recourse to S. 71 of the Evidence Act. But no such attempt is seen done in this case. As the Will is not proved as provided under S.68 or S.71 of the Evidence Act it cannot be accepted in evidence. It is the duty of the propounder of the Will(here the plaintiff) to prove the will. But she failed to do so. As plaintiff and counter claim plaintiffs claim right over the properties under Ext. A1 Will and as the propounder of the Will failed to prove it, it is not possible to pass a decree in the suit or in the counter claim on the basis of title (Ext. A1 will).

42. In view of the discussions made above, and of the arguments raised by both sides, I am of the view that there is merit in the argument of

the learned counsel of the appellants in AS.No.18/2019 that Ext.A1 Will deed was not proved and so it cannot be used in evidence. I am of the opinion that the plaintiff failed to prove Ext.A1 Will deed and so use of Ext.A1 in evidence and decreeing the suit and counter claim on the basis of Ext.A1, by the trial court is liable to be interfered by this court. But considering the facts and circumstance of the case and the available evidence, I am of the opinion that it is just and proper to give an opportunity to the parties to prove the Will deed as required by law and to adduce fresh evidence regarding the issues raised.

43. The additional defendants No. 9 to 13 (Appellants in AS.No.18/2019) filed IA.No. 03/2022 under Order XLI Rule 27 CPC for admitting 3 documents in evidence and marking the same as Ext.B7 to 9. The said documents are plaint, written statement and judgment in O.S.No.630/1997. The plaintiff and the defendant No.7 raised objection in marking the said documents stating that the parties herein and the parties in the aforesaid OS. No.630/1997 are not one and same and that the subject matter in both these cases are entirely different and so the documents can only be marked through witness and the respondents need opportunity to cross-examine the witness with regard to the said documents, before admitting the same in Evidence. On hearing the parties

and considering the facts and circumstances of the case, I am of the opinion that it is just and proper to give an opportunity to the adverse parties to cross-examine the witness with regard to the aforesaid documents, before arriving at a conclusion on the basis of the aforesaid offered documents. In view of the above reasons and in view of the conclusion arrived by me in Supra para No.42, the documents are not marked at this stage. But it is clarified that the parties are at liberty to approach the trial court as per law for getting the aforesaid offered documents marked, if they opted so. So IA.03/2022 is disposed accordingly.

44. In view of the discussion made above, these points are answered in favour of the appellants holding that the impugned judgment and decree dated 10.02.2008 of trial court is liable to be set aside and the matter is remanded back to the trial court for fresh disposal as per law.

Point No.(ii)

45. Considering the facts and circumstances of the case, I pass no order as to cost.

In the result, this appeal is allowed as follows:-

- (i) The decree and judgment dated 10.02.2008 passed by the trial court is set aside.

- (ii) The matter is remanded back to the trial court for fresh consideration mainly for the reason that Ext.A1 is not proved as required by law. The parties are at liberty to prove Ext.A1 Will deed No.4/1966 as required by law.
- (iii) The parties are at liberty to adduce further evidence, as per law, if desires so.
- (iv) Both the parties shall appear before the trial court, on 08/04/2022.
- (v) Transmit the records to the trial court forthwith.
- (vi) The trial court shall adjudicate the issues untrammelled by the observations in this judgment.
- (vii) No order as to costs.

(Dictated to the Confidential Assistant, transcribed by her, corrected by me and pronounced in open court this the day of 23rd March 2022.)

Sd/-
PRASANNA. K
SUB JUDGE

APPENDIX :-NIL

Id/-
SUB JUDGE

//True Copy//

SUB JUDGE

Typed by:R.A.C
Comp.by:

