

Antony Thomas vs Thomas Joseph

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SooperKanoon Citation : sooperkanoon.com/1294846

Court : Kerala

Decided On : Feb-08-2024

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : RSA/345/2014

Appellant : Antony Thomas

Respondent : Thomas Joseph

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
THURSDAY, THE 8TH DAY OF FEBRUARY 2024 / 19TH MAGHA,
1945 RSA NO. 345 OF 2014 AGAINST THE JUDGMENT DATED
31.08.2013 IN A.S.NO.24/2010 ON THE FILES OF THE ADDITIONAL
DISTRICT COURT, ALAPPUZHA AROSE FROM THE DECREE AND

**JUDGMENT DATED 11.02.2010 IN O.S.NO.108/2008 ON THE FILES
OF THE SUB**

COURT, ALAPPUZHA APPELLANT/1ST RESPONDENT/1ST PLAINTIFF:

ANTONY THOMAS AGED 52 YEARS, S/O.P.M.THOMAS, MAPPILASSERI, MALIYECKAL, CHAMPAKKULAM VILLAGE, KUTTANADU TALUK, PRESENTLY RESIDING AT 107 LANETTO DR, SPARTAN BURG, SC 29301, USA REPRESENTED BY HIS P/A. HOLDER BINUMON JOSPEH, AGED 35 YEARS, S/O.A.N.JOSEPH, ASARIPARAMBU HOUSE, VYSHUAMABHAGAOM, P.O., VANDANAM, ALAPPUZHA DISTRICT.**

**THE POWER OF ATTORNEY EXECUTED IN FAVOUR OF BINUMON JOSEPH IS CANCELLED AND REPLACED WITH POWER OF ATTORNEY EXECUTED IN FAVOUR OF N.J.JAMES AS PER ORDER DATED 08.02.2024 IN I.A.NO.1/2024 BY ADVS. SRI.T.R.HARIKUMAR RESPONDENTS/APPELLANTS & RESPONDENTS 2 TO 6/PLAINTIFF 2 & 3 & DEFENDANTS:

1 THOMAS JOSEPH AGED ABOUT 72 YEARS S/O.P.M.THOMAS, MAPPILASSERI HOUSE, NEAR RAILWAY OVER BRIDGE, PERUNNA P.O., CHANGANACHERRY, ALAPPUZHA DISTRICT. 2 THOMAS JOHN AGED ABOUT 63 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYAKKAL, CHAMBAKULAM VILLAGE, KUTTANAD TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 97 BLYD, NEW MILFORD, NEW JERSEY, 07646, USA.

3 THOMAS CHACKO AGED ABOUT 58 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYAKKAL, CHAMBAKULAM VILLAGE, KUTTANAD TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 1256, PENDARGRASS ROAD, JEFFERSON, GA 30549, USA. 4 DR.THOMAS MATHEW AGED ABOUT 73 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYECKAL, CHAMPAKULAM VILLAGE, KUTTANADU TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 300 PARK WAY, BLUE FIELD, W.VIGINIA, 24701, USA. 5 THOMAS GEORGE AGED ABOUT 69 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYECKAL, CHAMPAKULAM VILLAGE,

KUTTANADU TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 31171 OLD SANJUAN RD, SAN JUAN CAPO, CA 92675-2305 USA. 6 MARIAMMA DAVIS AGED ABOUT 67 YEARS, W/O DAVID, MAPPILASSERI MALIYECKAL, CHAMPAKULAM VILLAGE, KUTTANADU TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT PATHADAM HOUSE, ELAVOOR P.O., ELAVOOR MURI, ANGAMALY-683 572. 7 THOMAS SEBASTIAN AGED 63 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYECKAL, CHAMPAKULAM VILLAGE, KUTTANADU TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 138, WEST MON DR, GAFFNCY SC 29340, USA. 8 ABRAHAM THOMAS AGED ABOUT 56 YEARS S/O.P.M.THOMAS, MAPPILASSERI MALIYECKAL, CHAMBAKULAM VILLAGE, KUTTANAD TALUK, ALAPPUZHA DISTRICT, PRESENTLY RESIDING AT 114 ST.JAMES DR.SPTG, SC 29301, USA. BY ADVS. B.PRAMOD - FOR R1,R2,R3 BIJU VIGNESWAR - FOR R5, R6, R8

THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 08.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 8th day of February, 2024 This regular second appeal has been filed under

order XLII Rule 1 read with Section 100 of the Code of Civil

Procedure (CPC hereinafter) challenging the decree and

judgment in A.S. No.24 of 2010 dated 31.08.2013 on the

files of the Court of the Additional District Judge, Alappuzha arose from the decree and judgment in O.S. No.108 of 2008 dated 11.02.2010 on the files of the Court of the Sub Judge, Alappuzha. The appellant herein is the 1st defendant and respondents are plaintiffs and defendants 2 to 6 in O.S. No.108 of 2008.

2. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents, in detail. Perused the lower court records and the verdicts under challenge.

3. I shall refer the parties in this appeal with reference to their status before the trial court.

4. As per order dated 21.05.2014, my learned predecessor admitted this appeal by formulating the following substantial question of law:

Was the lower appellate court justified in taking the view that Exts.X1 and X2 confer only a restricted power on the power of attorney holder whereas the trial court was of the view that those documents confer absolute power on the power of attorney holder?

5. In this matter, the plaintiffs filed suit for partition

and to declare Partition Deed No.648/1996 of S.R.O, Pulinkunnoo, executed by the 1st defendant and Eliamma, the mother of the plaintiffs and defendants, as void ab initio or the same is vitiated by fraud and undue influence. The sum and substance of the plaint averments is that the plaint schedule properties originally belonged to Sri.P.M. Thomas, the father of the plaintiffs and defendants, on the strength of gift deed No.1282/1956 of S.R.O, Pulinkunnoo. According to the plaintiffs, the properties are partible and the plaintiffs and defendants succeed thereof consequent to the death of their father. Accordingly, after setting aside the Partition Deed No.648/1996, partition of the plaint schedule properties was sought for.

6. The 1st defendant filed written statement and

resisted the suit. The main contention raised by the 1st defendant is that partition deed No.648/1996 was executed with the consent and concurrence of all sharers and the mother signed the document for and on behalf of the children except the 1st plaintiff and the 1st plaintiff already executed release deed No.123/1989 in favour of the mother and other children. The further contention is that the 2nd and 3rd plaintiffs executed Exts.X1 and X2 power of attorney in favour of the mother

and acting on the said power of attorneys, Partition Deed No.648/1996 was executed. Therefore, the plaint schedule properties are not partible is the contention raised by the 1st defendant.

7. The trial court recorded evidence and tried the

matter. PWs 1 to 3 examined and Exts.A1 to A3 series marked on the side of the plaintiffs. DW1 examined and Ext.B1 marked on the side of the defendants. Exts.X1 and X2 were also marked.

8. The trial court after considering rival contentions, decreed the suit in part as under: In the result.

(a) The suits stands decreed in part,

(b) P2 and P3 are entitled to 1/6 share each over 4 cents of property which is allotted in favour of their mother as per the Partition Deed No.648/96 dated 1-3-1996.

(c) The cost of the proceedings will come out of the estate.

9. Appeal was filed before the First Appellate court

challenging the decree and judgment of the trial court vide A.S. No.24/2010. The First Appellate Court considered the matter and found that Exts.X1 and X2 power of attorneys were executed by the 2nd and 3rd plaintiffs in favour of their mother, but the mother was not authorized to execute a partition deed and the intent behind the execution of the power of attorneys is as stated in Clause No.1 of Exts.X1 and X2. Accordingly, the Appellate Court allowed the appeal on the premise that the partition deed marked as Ext.A2 would not affect the rights of the plaintiffs. The Appellate Court set aside the judgment of the trial court and decreed the suit as under:

In the result, the appeal is allowed and plaint schedule property shall be partitioned by metes and bounds among the appellants and respondents.

1. 1st appellant/plaintiff is entitled to get 1/9 share of 1/3 share of 1 acre 21 cents of plaint schedule property.

2. Appellants 2 and 3 (plaintiffs 2

and 3) and respondents/defendants are entitled to get equal share upon the (1/8) plaint schedule property after demarcating the share of 1st appellant/plaintiff.

3. The mesne profits shall be determined at the time of final decree proceedings.

4. Appellants/plaintiffs 1 to 3 are directed to apply for final decree within three months from the date of preliminary decree before lower court.

5. Cost of the suit will come out of the estate.

10. In the case at hand, the question of law

formulated is that, what are the powers conferred upon the mother by the executants of Exts.X1 and X2 power of attorney, who are the 2nd and 3rd plaintiffs? On perusal of Clause No.1, the intent behind execution of Exts.X1 and X2 could be gathered and the same is as extracted hereunder:

To sell by private treaty or by any other mode, convey or by way of all or any of the immovable properties, land, houses, vacant sites, building sites, enclosures belonging to me and situate at Nedumudy and Champakulam villages in Kuttanadu Taluk with all rights title and interest thereto to any person or persons whether in block or separately for any consideration whatsoever.

11. Going through Clause Nos.2 to 9 in Exts.X1 and

X2, the intent behind the execution of Exts.X1 and X2 to be gathered and the same is to convey the property either in block or separately for any consideration. But, Exts.X1 and X2, in no way permitted the mother to execute a partition deed of her choice without having received consideration entitled by plaintiffs 2 and 3. To put it otherwise, the intent behind Exts.X1 and X2 power of attorney is to get sale

consideration of the property for and on behalf of the executants of Exts.X1 and X2 by executing conveyance and not for executing partition deed, now under challenge.

12. In view of the discussion, the substantial question

of law answered holding that the first Appellate Court is fully justified in taking the view that Exts.X1 and X2 conferred only a restricted power on the power of attorney holder, whereas the trial court wrongly interpreted that Exts.X1 and X2 conferred absolute power to the power of attorney holder so as to execute partition deed also. Thus, it is discernible that the First Appellate Court rightly found that the mother had no authority to execute Ext.A2 partition deed No.648/1996 to give up the right of plaintiffs 2 and 3. Accordingly, ignoring partition deed, which is not binding on plaintiffs 2 and 3, the Appellate Court set aside the trial courts judgment and allowed the appeal as herein above extracted.

13. On perusal of the available materials, it is

discernible that the First Appellate Court rightly granted partition and the said finding appears to be very reasonable. Accordingly, after confirming the decree and

judgment of the First Appellate Court, this regular second

appeal stands dismissed. All interlocutory orders stand vacated and all interlocutory applications pending in this regular second appeal stand dismissed.

Sd/- A. BADHARUDEEN SK JUDGE

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