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Sivasankaran vs Sukumaran

Sivasankaran vs Sukumaran

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Court : Kerala

Decided On : Aug-30-2019

Judge : Honourable Mrs. Justice Shircy V.

Appeal No. : RFA/487/2004

Appellant : Sivasankaran

Respondent : Sukumaran

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE SHIRCY V. FRIDAY, THE 30TH DAY OF AUGUST 2019 / 8TH BHADRA, 1941 RFA.No.487 OF 2004 AGAINST THE JUDGMENT IN OS 247/2001 DATED 31-03-2004 OF PRINCIPAL SUB COURT,IRINJALAKUDA APPELLANT/PLAINTIFF: SIVASANKARAN, S/O. VELAYIL RAMAN, MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. BY ADV. SRI.K.G.BALASUBRAMANIAN RESPONDENTS/DEFENDANTS 2 TO 5 AND ADDITIONAL DEFENDNATS 6 TO 8: 1 SUKUMARAN, S/O. VELAYIL RAMAN, MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 2 DHARMARAJAN SO. -DO- -DO-. 3 AJITHA DHARMARAJAN

W/O. DHARMARAJAN, -DO- -DO-. 4 SANTHAKUMARI (DIED.LRS. IMPLEADED) W/O. KARANATH VASUDEVAN, -DO- -DO-. 5 NIRMALA, W/O. VELAYIL PADMANABHAN, MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 6 PRASANTH S/O. -DO- -DO- -DO-.

7. PRIYA, W/O. MELEDATHUVEETTIL RAJEEV,

THALIKULAM DESOM AND VILLAGE, CHOWGHAT TALUK. ADDL. BEENA R8 D/O KARNATH VASUDEVAN,PAPPINIVATTOM P.O, 680685,THRISSUR DISTRICT ADDL. SEEMA, R9 D/O KARNATH VASUDEVAN, PAPPINIVATTOM P.O, 680685, THRISSUR DISTRICT ADDL. DEVADASAN R10 S/O KARNATH VASUDEVAN, PAPPINIVATTOM P.O, 680685,THRISSUR DISTRICT ADDL. SUNIL KUMAR R11 S/O KARNATH VASUDEVAN, PAPPINIVATTOM P.O, 680685,THRISSUR DISTRICT ADDL. ANIL KUMAR R12 S/O KARNATH VASUDEVAN, PAPPINIVATTOM P.O, 680685,THRISSUR DISTRICT (LEGAL HEIRS OF DECEASED 4TH RESPONDENT ARE IMPLEADED AS ADDL R8 TO ADDL.R12 AS PER ORDER DATED

R1-3, R5, R7 BY ADV. SRI.JAYKAR.K.S. R1-3, R5, R7 BY ADV. SMT.MEENA.A. R1-3, R5, R7 BY ADV. SMT.PREETHY KARUNAKARAN R1-3, R5, R7 BY ADV. SRI.R.RAJESH KORMATH R1-3, R5, R7 BY ADV. SRI.RAHUL VARMA R1-3, R5, R7 BY ADV. SRI.V.S.ROBIN R1-3, R5, R7 BY ADV. SMT.SANJANA R.NAIR

R6 BY ADV. G.SREEKUMAR (CHELUR) BY ORDER

R8-12 BY ADV. SRI.AJEESH K.SASI R8-12 BY ADV. SMT.POOJA PANKAJ THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 08.03.2019, ALONG WITH RFA.42/2005(E), THE COURT ON 30.08.2019 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE SHIRCY V. FRIDAY, THE 30TH DAY OF AUGUST 2019 / 8TH BHADRA, 1941 RFA.No.42 OF 2005(E) AGAINST THE JUDGMENT IN OS 247/2001 DATED 31-03-2004 OF PRINCIPAL SUB COURT,IRINJALAKUDA APPELLANT/DEFENDANT NO. 5: SANTHA, AGED 66 YEARS, (DIED) W/O.VASUDEVAN, KARANATH HOUSE, MATHILAKAM P.O., THRISSUR, (NAME MISTAKENLY NOTED IN THE PLAINT AS SANTHAKUMARI).

APPELLANTS 2 TO 7 IMPLEADED ADDL. K.V. DEVADAS, S/O. SANTHA, AGED 56 YEAERS, A2 RESIDING AT KARANATH HOUSE, P.O. KODUNGALLUR, THRISSUR DISTRICT, PIN 680 664. K.V. BEENA, AGED 54 YEARS, M-11, ADDL. A3 APPOLO NAGAR, REKAMPURA ROAD, PRATAP NAGAR, UDAIPUR, RAJASTHAN - 313 001. ADDL. K.V. SUNIL KUMAR, AGED 53 YEARS, C-158, A4 METRO ROAD, NEW DELHI -2. ADDL. K.V. ANILKUMAR, AGED 51 YEARS, A5 315-KAPPAL POLUR STREET, B-6, OLD WASHERMAN, PETTA, CHENNAI, TAMIL NADU. ADDL. K.V. AJITHKUMAR, AGED 48 YEARS, A6 KARANATH HOUSE, P.O. MATHILAKAM, THRISSUR DISTRICT, PIN 680 685.

ADDL. K.V. SEEMA, AGED 46 YEARS, 59, A7 CAUSY NEST, UDAIPUR, RAJASTHAN. LEGAL HEIRS OF SOLE APPELLANT ARE IMPLEADED AS ADDL. A2 TO A7 VIDE ORDER DTD. 8.6.2015 ON I.A. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SMT.M.M.DEEPA SRI.M.GEORGE THOMAS RESPONDENTS/PLAINTIFF & DEFENDANTS 1 TO 4 & 6 TO 8: 1 SIVASANKARAN, S/O. VELAYIL RAMAN, MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 2 SUKUMARAN, S/O.VELAYIL RAMAN MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 3 DHARMARAJAN, S/O.VELAYIL RAMAN MATHILAKAM DESOM,PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 4 AJITHA DHARMARAJAN, W/O.DHARMARAJAN, MATHILAKAM DESOM, PAPPINIKVATTOM VILLAGE, KODUNGALLUR TALUK. 5 E.K.NIRMALA, W/O.VELAYIL PADMANABHAN, MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 6 PRASANTH, S/O.VELAYIL PADMANABHAN, MATHILAKAM DEDSOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK. 7 PRIYA, D/O.VELAYIL PADMANABHAN,

MATHILAKAM DESOM, PAPPINIVATTOM VILLAGE, KODUNGALLUR TALUK.

R1 BY ADV. SRI.K.G.BALASUBRAMANIAN R2 TO 5 & 7 BY ADV. SRI.JAYKAR.K.S. R2 TO 5 & 7 BY ADV. SMT.M.R.MINI R2 TO 5 & 7 BY ADV. SMT.MEENA.A. R2 TO 5 & 7 BY ADV. SMT.PREETHY KARUNAKARAN R2 TO 5 & 7 BY ADV. SRI.R.RAJESH KORMATH R2 TO 5 & 7 BY ADV. SRI.RAHUL VARMA R2 TO 5 & 7 BY ADV. SRI.V.S.ROBIN R2 TO 5 & 7 BY ADV. SMT.SANJANA R.NAIR

R6 BY ADV. G. SREEKUMAR(CHELUR) BY ORDER

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 08.03.2019, ALONG WITH RFA.487/2004, THE COURT ON 30.08.2019 DELIVERED THE FOLLOWING:

JUDGMENT

[RFA.487/2004, RFA.42/2005] Dated this the 30th day of August 2019 The plaintiff in O.S. No. 247 of 2001 on the file of the Principal Subordinate Court, Irinjalakkuda is the appellant in R.F.A. No. 487 of 2004. The 5 th defendant in the suit is the appellant in R.F.A. No. 42 of 2005. The suit was filed for partition of the plaint schedule property. By a judgment and decree dated 31st March 2004 the suit was dismissed. The appeals arise out of the said judgment and decree.

2. The parties are hereinafter referred to as the plaintiff and the defendants, per their ranking before the court below.

3. In order to appreciate the controversy involved in this

appeals, it is necessary to set out the relevant facts herein below: The plaintiff and the 5th defendant are the children of one Narayani. Narayani was married to one Kumaran. Kumaran died about 40 years back. After his death, Raman, the brother of Kumaran remarried Narayani and the plaintiff was born to them on 15.7.1942. The 5th defendant is the daughter of Narayani in her marriage with Kumaran. After the death of Narayani in the year 1946, Raman again married one Narayani, D/o.

Ravunni and the defendants 1 to 3 were born to them in the said wedlock. The parties belong to Ezhava community and are residents of a village in Erstwhile South Malabar. The plaint schedule property was obtained on lease by Kumaran as per lease deed No.750/1929 of SRO Mathilakam from its Jenmi. He was holding possession of the property in his name and on his death, the tenancy right devolved upon Narayani, the mother of the plaintiff and the 5 th defendant. On her death, (Narayani), the tenancy right devolved upon the plaintiff and the 5th defendant and while they were minors, Raman was managing the property on their behalf. In the year 1958, Sivasankaran, the plaintiff, left the place in search of a job and returned in the year 1978. Thereafter, he was residing with his father and the defendants 1 and 2 in the plaint schedule property. The plaintiff and the 5th defendant had right over the plaint schedule property and the defendants 1 to 3 had absolutely no right over the property. The plaintiff has been residing in the house situated on the northern portion of the plaint schedule property. A pathway having a width of 10 feet is lying on the south of the building in east west direction, which has been put up by him. The property on the south of the pathway also belongs to the plaintiff. Defendants 1 to 4 have no right in the property. However, they have put up a compound wall, ignoring the objection raised by the plaintiff, on the southern side of the pathway. Thereupon, the plaintiff made a demand with the 5th defendant to partition the property. Then she informed that she had already assigned her entire right upon the property to her father Raman and thus, the plaintiff has no right over the same. The assignment deed executed by the 5th defendant infact will not affect the rights of the plaintiff over the plaint schedule property. It is also learnt that the defendants 1 to 3 have created a false will deed with respect to the property of Raman and filed a suit before the Munsiff's Court as O.S. No. 419/2000. The house occupied by the defendants 1 and 2 was put up by Raman out of the income from the plaint schedule property. The plaintiff permitted the defendants 1 and 2 being his brothers to reside in the building. The plaint schedule property is liable to be divided into two equal shares and he is entitled to get one such share.

4. Defendants 1 to 4 filed a common written statement

inter alia contending that the plaint schedule property originally belonged to Sankaran, S/o. Kannappan on the basis of a registered lease deed. The same was given to Kumaran, S/o. Sankaran on tenancy. Kumaran married Narayani and the 5th defendant was born in the year 1936. Kumaran died in the year 1942. Thereafter, Narayani married Raman, the brother of Kumaran. At that time, women did not have any right in the property of their husbands. Even if Narayani had derived any right in the property, the same had been lost in view of her remarriage with Raman. Hence on the death of Kumaran, the property devolved upon Raman and the 5th defendant, the only daughter of Kumaran. When the 5th defendant attained the age of majority, she assigned her right in favour of Raman as per assignment deed No. 1466/1955. In the meantime, the predecessor of Kumaran assigned the mortgage right in favour of the jenmi and Raman attorned with Jenmi and obtained direct lease over the property and he obtained purchase certificate over the said property. Narayani, the first wife of Raman died in the year 1946 and thereafter Raman married Narayani, D/o. Ravunni and the defendants 1 to 3 were born in the wedlock. The 4th defendant is the wife of the third defendant. On 19.2.1990 Raman executed a will and registered it as document No. 9/1990 bequeathing the property in favour of the defendants 1 to 4 and the plaintiff. Raman had also surrendered a portion of the land for the purpose of formation of a pathway. On the death of Raman, the will has come into effect. Even though Raman gave only a right to get maintenance to his wife, pursuant to a rectification deed, his wife was also given right over the property. On his death, the properties were taken by the parties as per the deed. The plaintiff took possession of the property allotted to him and mortgaged the same before the South Indian Bank, Mathilakam for purchase of a vehicle. The plaintiff and the defendants recognized the will and acted upon it and hence they have no right to challenge the same. This suit is filed only as a counter blast to O.S. No. 519 of 2001 filed before the Munsiff's Court, Kodungallur. The suit is a frivolous one and the case of the plaintiff that he has put up a pathway and the defendants 1 and 2 are occupying the other house in the plaint schedule property with his permission are incorrect. So, the claim raised by the plaintiff for partition has been denied by the defendants.

5. The 5th defendant in a separate written statement

admitted that the plaint schedule property originally belonged to Kumaran on lease as per lease deed No. 715/1929 and on his death, his right devolved upon herself and his wife Narayani. The allegation that the plaintiff's father was looking after the property as the plaintiff and the 5 th defendant were minors is not correct. Till the death of Narayani, she was managing the property. Actually, the plaint schedule property belonged to the 5th defendant alone and the plaintiff and other defendants have no right over the same. The 4 th defendant had only a right of maintenance being the wife of the 3 rd defendant. No assignment deed was executed by the 5 th defendant assigning her right over the property to Raman. Kumaran and Raman are the children of Vellayil Sankaran. The 5th defendant is the child born to Narayani and Kumaran. Kumaran expired in the year 1939 or 1940. Thereafter, Raman the brother of Kumaran, married Narayani, the mother of the 5th defendant. The plaintiff is the child born to Raman and Narayani and he was born on 15.7.1942. Narayani died in the year 1946. Thereafter, Raman married Narayani, D/o. Ravunni and defendants 1 to 3 are the children born to them. Raman died in the year 1993 and Narayani, D/o. Ravunni, died in the year 1999. Thus the plaint schedule property belongs to the plaintiff, the defendants 1 to 3 and the 5 th defendant. After the death of Kumaran the property devolved upon the 5 th defendant and her mother Narayani. So, the 5 th defendant has half right over the property. The remaining half right was with her mother Narayani. On the death of Narayani her half right devolved upon the plaintiff and the 5 th defendant along with her husband Raman. On the death of Raman, his 1/3 rd right over the half right devolved upon his 2 nd wife Narayani, the plaintiff and defendants 1 to 3. On the death of 2 nd wife Narayani, her right devolved upon defendants 1 to 3, her children. So the property has to be divided among them and the plaintiff is entitled to get 9/45 shares, the 5 th defendant is entitled for 30/45 shares and the defendants 1 to 3 for 2/45 shares each in the plaint schedule property. So, she had also prayed for partition of the property and allotment of her separate share.

6. During the pendency of the suit, the 1st defendant

died and defendants 6 to 8 were impleaded as his heirs. Defendants 6 and 8 filed written statement adopting the contentions of the defendants 1 to 4. The 7 th

defendant was set ex parte.

7. In order to establish the case of the plaintiff, he was

examined as PW1 and Exts. A1 to A3 were marked. On the side of the contesting defendants, DWs 1 to 9 were examined and Exts. B1 to B13 were marked. Exts.C1 and C2 were marked as court exhibits and Exts. X1 to X4 were also marked.

8. The court below, after appreciation of the oral and

documentary evidence, dismissed the suit, with costs. The said verdict is under challenge at the instance of the plaintiff and the 5th defendant, by filing separate appeals.

9. Heard Sri. K.G. Balasubramanian, the learned counsel

appearing for the appellant in RFA No. 487 of 2004 who is the 1st respondent in RFA No. 42 of 2005/plaintiff, Smt. Preethi Karunakaran, the learned counsel for the respondents 1 to 3 and 5 and 7 in RFA No. 487 of 2004, Sri. Vijayabhanu, the learned Senior Counsel for respondents 8 to 12 in RFA No. 487 of 2004 who are the legal heirs of the sole appellant in RFA No. 42 of 2005 as well Sri. G. Sreekumar Chelur, the learned Counsel for the respondent No. 6 in both the appeals.

10. The plaintiff and the defendants belong to Ezhava

community of erstwhile South Malabar. The plaintiff contended that the defendants failed to prove that, they followed Mithakshara law modified by custom. Admittedly, Kumaran and Raman are the sons of Sankaran. Kumaran had married Narayani and the 5th defendant was the daughter born to them in their wedlock . When Kumaran expired Narayani married Raman, the brother of Kumaran and the plaintiff was born to them in the wedlock on 15.7.1942. Narayani died in the year 1946 and after her death, Raman married another lady by the very same name Narayani, D/o. Ravunni. Defendants 1 to 3 are the children born to Raman and Narayani (2 nd wife). The 4th defendant is the wife of the 3rd defendant.

11. Admittedly Kumaran had leasehold right over the

plaint schedule property having an extent of 1 Acre 70 cents. Ext.A1 is the lease deed dated 25.2.1929. The recitals of the lease deed reveal that the assignor had mortgage right over the plaint schedule property. Kumaran died intestate. On the death of Kumaran, his rights in the plaint schedule property devolved upon his wife Narayani and his daughter, the 5 th defendant,who is the appellant in RFA 42/2005 in equal shares is the case pleaded and proved. Later she remarried Raman ,the brother of Kumaran and plaintiff was born in their wedlock. Narayani expired in the year 1946. These facts are not in dispute. The dispute in fact revolves on succession. According to the plaintiff, on the death of Narayani her right devolved upon him and the 5th defendant, the daughter of Narayani in Kumaran, hence the property have to be divided into two among himself and the 5th defendant and the other defendants, have no right over the property. But according to the defendants 1 to 4 when Narayani remarried Raman she ceased to have right in the property as per Act 15 of 1856 (The Hindu Widows' Remarriage Act, 1856). Whether the right of Narayani in the property she inherited as the heir of Kumaran was lost on her remarriage with Raman, is the first question involved in this case. As mentioned earlier, Narayani died in the year 1946 and in fact she had inherited the property of Kumaran as his widow. Naryani's death was also before the enactment of the Hindu Succession Act, 1956. The plaintiff has a case that on the death of Kumaran, the tenancy right devolved on Narayani and her daughter the 5 th defendant. But the defendants 1 to 4 contended that on remarriage of Narayani to Raman she ceased to have right over the property even if any right is inherited by her, as per Hindu Widows' Remarriage Act, 1856. On the other hand according to the plaintiff the said enactment had no application to South Malabar area and the family was governed by Makkathayam law, and the property devolves upon the wife and children. For the sake of convenience, Section 2 of Hindu Widows' Remarriage Act, 1856 is reiterated as follows: 2. Rights of widow in deceased husband's property to cease on her remarriage.- All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a

limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same. Section 3 of the Hindu Widows Remarriage Act reads as follows: 3. Guardianship of children of deceased husband on the remarriage of his widow.- On the remarriage of Hindu widow, if neither the widow nor any other person has been expressly constituted by the Will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the places where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have no property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

12. The learned counsel for the defendants1 to 4 would

argue that on remarriage of Narayani to Raman, her right over the property inherited as the heir of deceased Kumaran had ceased and her right would devolve upon Raman, the brother of Kumaran. But the learned counsel for the plaintiff would argue that the Act has no application as Narayani's marriage was from the very same family. It is further argued that the object of the Act is to ensure that the family property shall not go out of the family when a widow is remarried. It is also pointed out by the learned counsel for the plaintiff that depriving the right of a female on the ground of remarriage is opposed to the basic

structure of Constitution and in violation of gender equality amounting to discrimination. In short, it was argued that Narayani's right was not excluded or divested by her remarriage.

13. According to the defendants 1 to 4 under Mitakshara

law property of a male remain as coparcenary property and so Narayani cannot have half share in the property on the death of her husband Kumaran and even if she had any right in the property on the death of Kumaran, on her remarriage with Raman in 1941, her right in the property was lost. Succession would open on the date of death of Kumaran and she re-married soon thereafter. Hindu Widow's remarriage Act was repealed in 1983 but her remarriage was much before 1983 and much before the commencement of Hindu Succession Act, 1956. Hence, on the death of kumaran, the property devolved on Raman, his brother and the 5 th defendant, her only daughter because of her remarriage. Later the 5th defendant assigned her half right in the plaint schedule property in favour of Raman, the father of the plaintiff and the defendants 1 to 3 by an assignment deed dated 18.11.1955. Ext.B5 is the said assignment deed. So, according to the defendants 1 to 4, the 5 th defendant assigned her half right in the property in favour of Raman. Therefore, the plaintiff's assertion that Narayani retained half right in the property till her death and it devolved on him as her son upon her death and the property devolved upon him and the 5 th defendant in equal shares, cannot be correct. In fact whether the system of inheritance followed by the parties is Makkathayam Law of inheritance or Mithakshara Law modified by custom, the court has no sufficient materials to form an opinion. Sufficient evidence has not been brought on record by the parties. In the absence of basic and relevant evidence, a meticulous exercise of assessing evidence to find out the system of inheritance at the relevant time specifically, i.e., on the death of Kumaran in the year 1942 and of Narayani in the year 1946, is a difficult task. Therefore, whether the court below is justified in dismissing the suit for partition alone with the available materials on record, is to be considered. The larger question, whether the Hindu Widow Remarriage Act, 1856 is unconstitutional, as hit by Articles 13, 14, 19 and 21 of the Constitution of India, need not be considered in this case with the given sets of fact.

14. The 5th defendant had denied the execution of the

assignment deed and transfer of her right in favour of Raman. She had also a contention that even if such a document was executed it is void ab initio as she was a minor on the date of the alleged execution of the assignment deed, ie; on 18.11.1955. In order to substantiate her case that she was a minor on 18.11.1955 she relies on Ext.B1, extract of the admission register of Government U.P school Perinjanam, where she joined in the 6th standard. This document was produced to show that her date of birth is 15.9.1938. The name of the student is Santha. The admission number is 2807. Ext.X4 is the copy of the admission register of Government U.P school Perinjanam which would show that admission No.2807 pertains to Santha whose date of birth is 15.9.1938. On the basis of these two documents whether the contention raised by the 5th defendant that she was a minor on 18.11.1955, on the date of assignment deed is correct or not is the question to be looked into.

15. DW7, the present Headmaster of the Govt. U.P School,

Perinjanam was examined to prove Ext.X4 document. He had deposed that the name of the student as per Ext.X4 ; admission No.2807 is one Santha and Ext.X3 is also the very same Admission Register pertaining to an admission dated 21.5.1965. The student is one Meera Bai. According to him, same number will be given to admissions in different years. But he deposed that the date of birth shown in the admission register may not be accurate in every case and there is every possibility to have variations to the same. It is a common knowledge that earlier when a child is admitted in a school, normally the age will be reported by the guardian or by the person who accompany the child to the school, without the support of any authenticated document, such as birth certificate. The evidence of DW7 fortifies the said fact. Therefore, the entries in Exts.X4 and B1 could not be treated as conclusive proof of evidence to ascertain the date of birth of the 5th defendant as 15.9.1938. It is pertinent to note that the name of the 5th defendant is Santhakumari as per the plaint and Ext.B5 assignment deed. But in Exts.B1 and X4 the name is shown as 'Santha' and not as 'Santhakumari' and so these documents are not sufficient to establish that her date of birth is 15.9.1938. Apart

from Exts.B1 and X4 no other documents are available on record to prove that the date of birth of the 5th defendant is 15.9.1938 so as to conclude that on the date of execution of Ext.B5 assignment deed she was a minor and the document is void on that ground. It is also pertinent to note that the plaintiff when preferred the suit was aged 60 years. As per the plaint, his date of birth is mentioned as 15.7.1942, but no document is available on record to prove his exact age. According to him he went in search of a job in the year 1958. Normally, one may leave the house in search of a job after attaining the age of majority or atleast around that age. So also, it has to be taken note of the fact that the plaintiff was aged 63 years when he was examined before the court on 5.2.2004. So he might have born in the year 1941. As admitted by the 5th defendant, she was four years elder to the plaintiff and if that be so, she might have been born in the year 1936 or 1937. When her age is calculated on the basis of the evidence on record it could safely be concluded that at the time of execution of assignment deed on 18.11.1955 she had attained the age of majority. No reliable or believable evidence/material are available to support the plea of the 5th defendant that she was a minor at the time of execution of Ext.B5.

16. DW2 is Karanathu Vasudevan, a witness to Ext.B5

who is none other than the husband of the 5 th defendant. He deposed before the court that in the month of July, 1955 he married the 5th defendant. He had no case that she was a minor at that point of time. According to him, as their marriage was against the interest of the family, they left Kerala and resided at Chennai for about 1 years. He further deposed that during 1955 he never stood as a witness to a document executed by the 5th defendant alienating her property. In cross examination he had denied his signature on the reverse side of the first page of Ext.B5 and deposed that there was also no similarity to his admitted signature. He further deposed that his wife is not known as Santhakumari and Ext.B5 document was not executed by his wife, Santhakumari. He has gone to the extent of deposing before the court that the signature in the written statement appears to be as that of the 5 th defendant but the signature in the Vakalath as well the signature in Ext.B5 document, are not the signatures of his wife and she did not execute any document alienating/transferring her share in her property to Raman. In his anxiety

to deny the execution of Ext.B5 he had even denied the signatures of the 5th defendant in the admitted documents, such as written statement, Vakalath etc. So the evidence of DW5 is not sufficient to discard Ext.B5 document and there is nothing wrong in concluding that he is an interested witness.

17. Ext.B6 is document No.2574 of the year 1943.By this

document Sankaran, S/o. Kannappan had assigned his lease hold right to the original jenmi Kunjetty and others. Thereafter Raman had taken the plaint schedule property on lease directly from the jenmi as evident by Ext.B7 dated 7.8.1956. Later on the application submitted by Raman Ext.B8 purchase certificate was issued in his favour (Raman). Ext B8 is dated 10.3.1975. Ext.B9 series are receipts evidencing payment of purchase price. In Ext.B7 there is reference about Ext.B5 assignment deed executed by the 5 th defendant, that her right obtained as the legal heir of her father Kumaran on his death, was assigned in favour of Raman. All these documents would substantiate the fact that he was having right over the property and the 5 th defendant had assigned her right in favour of Raman and thus Raman acquired the entire right in the plaint schedule property.

18. The further case of the defendants 1 to 4 is that

Raman executed Ext.B2 will deed which was registered as 9/90 and bequeathed all his rights in the property in favour of the defendants 1 to 4 and the plaintiff and on his death it has taken effect and the beneficiaries had taken possession of their respective shares in terms of the will deed. In order to prove the execution of the will deed, DW6 an attestor cum scribe was also examined and he deposed that he had witnessed Raman, the testator affixing his signature in the document and he had affixed his signature in the will deed in the presence of Raman and the other attesting witness and Raman had affixed his signature in the will deed in his presence as well in the presence of the other witness who was examined as DW5. Of course DW5 had denied his signature in Ext.B2 will deed. But in order to prove the execution of a will deed the examination of one attesting witness alone is sufficient as per the mandate of Section 68 of Evidence Act.

19. Now, the crucial question to be looked into is

whether the execution of the will deed was properly proved in this case. It is well settled that the propounder has to prove that the will satisfy the requirements of Section 63 of the Indian Succession Act, 1925 and as mandated in Section 68 of the Evidence Act. In Gopal Swaroop v. Krishna Murari Mangal and others [(2010) 14 SCC 266] it was held that: 17. A careful analysis of the provisions of Section 63 would show that the proof of execution of a will would require the following aspects to be proved:

(1) That the testator has signed or affixed his mark to the will or the will has been signed by some other person in the presence and under the direction of the testator.

(2) The signature or mark of the testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a will.

(3) That the will has been attested by two or more

witnesses each one of whom has signed or affixed his mark to the will or has been seen by some other person signing the will in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of the signature or mark or the signature of each other person.

(4) That each of the witnesses has signed the will in the

presence of the testator. [See H.Venkatachala Iyengar v. B.N.Thimmajamma (AIR 1959 SC 443) & Beni Chand (since dead) now by L.Rs. v. Smt.Kamla Kunwar and others) (AIR 1977 SC 63)]

20. Here, though DW5, an attesting witness, denied of

having seen the testator affixing his signature in the will deed DW6, the other attesting witness had witnessed the same and had given evidence as per the mandate of Section 68 of Evidence Act and proof of all the formalities required under Section 63 of the Succession Act are also there and therefore, the execution of the will deed stands proved.

21. In order to establish that the will deed has taken

effect and the beneficiaries including the plaintiff himself had acted upon the same, relies on Ext.X1 a file maintained by the Manager of the South Indian Bank pertaining to a loan availed of by the plaintiff. Ext.X1 file contains the application submitted by the plaintiff to avail a loan for purchase of a Bajaj Tempo Van. Certain extent of property included in the will deed and bequeathed to his share as per the will deed had been offered as collateral security for the above loan transaction and the will deed which was registered as 9/90 of Mathilakam Sub Registry (Ext.B2/Ext.B3) was deposited before the Bank to avail the loan. Ext.X1 would show that Ext.B5 as well Ext.B2 documents were also submitted by the plaintiff as the title deeds of the property offered as collateral security for availing the loan from the bank and the bank had accepted the same and sanctioned the loan. Ext.X1 file maintained by the bank and produced before the court and marked through DW3 would establish that the will deed was acted upon and the properties were taken possession of by the parties concerned in terms of the will deed.

22. DW4, the Village Officer of Padivattom was also

examined to prove the case of the defendants 1 to 4. He had deposed that 38 cents of land in Sy.No.126/2 of Pappinivattom and 16 cents in Sy.No.155/12 of Koolimuttom village belongs to the plaintiff and he is the Village Officer of both the villages and the document pertaining to the 16 cents in Sy.No.155/12 is the will deed registered as 9/90 (B2/B3). These are the glaring piece of evidence and circumstances to substantiate the fact that the will had taken effect and the plaintiff and the defendants 1 to 4 are enjoying the properties as the beneficiaries of the will deed executed by their father Raman.

23. So on an evaluation of the entire evidence available

on record, it is not possible to infer that Ext.B5 assignment deed is a void document as contended by the 5 th defendant and hence, she is entitled to get share in the property. So also the will deed stands proved by the evidence available on record and it has taken effect and that, the parties are holding

possession of their shares in the property in terms of the will deed. The assertion made by the plaintiff that the plaint schedule property is liable to be partitioned is untenable and unacceptable in the light of the evidence adduced and proved by the parties. So, the finding of the court below that the plaint schedule property is not available for partition as requested by the plaintiff does not warrant an interference by this court. Material on record also reveals that the 5 th defendant had executed the assignment deed after receiving valid consideration and she had attained the age of majority at the time of its execution and DW2 her husband stood as a witness to the deed. Therefore, I find that there is absolutely no legal and valid ground to interfere with the impugned

judgment and decree under challenge. Accordingly, these

appeals stand dismissed. The judgment and decree are only to be confirmed and I do so. Considering the relationship of the parties they are directed to bear their respective costs. The interlocutory application stands disposed of. Sd/- SHIRCY V JUDGE smm/sb

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