
(2025) 10 KH CK 0021

Kerala HC

Case No: Regular Second Appeal Nos.1337 Of 2012 & 108 Of 2013

Prasanna D/o Dasamm

APPELLANT

Vs

Nesamma (Died) Lrs
Impleaded)

RESPONDENT

Date of Decision: Oct. 9, 2025

Acts Referred:

- Transfer of Property Act, 1882 — Section 3, 123
- Specific Relief Act, 1963 — Section 31, 39
- Evidence Act, 1872 — Section 68
- Limitation Act, 1963 — Article 58, 59, 65

Hon'ble Judges: Easwaran S, J

Bench: Single Bench

Advocate: P.B.Krishnan, P.B.Subramanyan, N.Ajith, Geetha P.Menon, P.M.Neelakandan, Sabu George, B.Anusree, Manu Vyasana Peter, Meera P., V.Suresh, G.Sudheer

Final Decision: Dismissed

Judgement

Easwaran S., J

1. Aggrieved by the concurrent findings rendered by the Sub Court, Neyyattinkara in OS No.180/2006, a suit for declaration, recovery of possession and injunction, and the II Addl. District Court, Thiruvananthapuram, the plaintiffs have come up in RSA No.1337/2012; while the counterclaim plaintiff (defendant) in that suit approached this Court in RSA No.108/2013 aggrieved by the reversal of the judgment and decree in the counterclaim.

2. The facts for disposal of the cases will be as narrated in RSA No.1337/2012, since the said appeal is preferred by the plaintiffs.

3. The plaintiffs claim that they are the only legal heirs entitled to inherit the property of one Nesamony, who is the brother of the defendant. During the lifetime of Nesamony, four settlement

deeds numbered as 85/98, 155/01, 153/01 & 154/01, and a release deed No.35/02 and an original Will No.2/98 were executed. The defendant, sister of the plaintiffs' father, filed OS No.644/86 for partition, which was decreed, and the property was partitioned. Thereafter, Nesamony was in possession of his share. The plaintiffs were born to one Dasamma, in the wedlock of one Simson. After the death of Simson, Nesamony married the plaintiffs' mother, Dasamma. Late Nesamony executed Exts.A3 & A4 settlement deeds dated 21.1.1998 in favour of the 4th plaintiff and plaintiffs 1 to 3, respectively, and Exts.A5 and A6 settlement deeds dated 5.2.2001 in favour of the 2nd and the 3rd plaintiffs, respectively. OS No.152/01 was instituted on 19.2.2001 by late Nesamony for declaration of title and putting up of boundaries against the defendant and while so, a release deed was alleged to have been executed in favour of the plaintiffs on 9.1.2002 (Ext.A23). On 31.5.2002, OS No.152/2001 was decreed, and on 10.12.2002, an execution petition was filed as EP No.417/2002. On 27.4.2003, Nesamony passed away and EA No.353/2003 was preferred by the appellants herein for impleading themselves as the legal heirs of the deceased decree holder Nesamony. On 28.11.2003, the defendant also preferred EA No.938/2003 seeking herself to be impleaded as the legal heir of the deceased Nesamony. On 12.1.2004, the application preferred by the appellants was dismissed and the application preferred by the defendant was allowed. Challenging the common order dated 12.01.2004 in EA Nos.353/2003 and 938/2003, WP(C) No.17393/2004 was filed. By judgment dated 29.6.2004, this Court allowed the writ petition, and the matter was remanded for fresh consideration, and thereafter a fresh order was passed on 17.3.2005. The said order was questioned in WP(C) No.14478/2005 and by judgment dated 11.10.2006, the writ petition was closed with the observation that, the appellants are at liberty to institute a fresh suit for declaration of title and if they succeed, the benefit accrued to the petitioner in EA No.938/2003 will enure to them. Accordingly, the present suit, OS No.180/2006, was filed. On 24.9.2007, the plaintiffs sought amendment of the reliefs to include recovery of possession, and the defendant filed an additional written statement incorporating a counterclaim seeking declaration of title, recovery of possession and injunction. Subsequently, IA No.789/2009 was preferred by the plaintiffs to exclude the counterclaim from the written statement, which was dismissed by order dated 15.10.2009. The defendant resisted the suit, contending that the executing court in an earlier proceeding had already found that the settlement deeds relied on by the plaintiffs are fabricated documents and therefore, the same are not binding on her. If the plaintiffs are excluded, the defendant is the sole legal heir and entitled to the entire property of the deceased Nesamony. The plaintiffs, on the other hand, contended that in the light of the observations made by this Court in WP(C) No.14478/2005, the order passed in EA Nos.353/03 and 938/03 is not final and not binding upon the defendant. On behalf of the plaintiffs, Exts.A1 to A26 documents were marked and PW1 to PW5 were examined. On behalf of the defendant, Exts.B1 to B17 documents were marked and DW1 was examined. Ext.C1 is the report of the advocate commissioner and Ext.C1(a) is the sketch. Ext.X1 is the certified copy of settlement deed No.153/01 executed by Nesamony in favour of the 2nd plaintiff. The trial court, on appreciating the oral and documentary evidence, framed the following issues for consideration:

1. Whether the plaintiffs are entitled for a declaration as prayed for?

2. Whether the plaintiffs are entitled to get a permanent prohibitory injunction against the defendant as prayed for?

3. Whether the plaintiffs are entitled to get recovery of possession as prayed for?
4. Whether the defendant is entitled to get a declaration over the counter claim schedule property as prayed for?
5. Whether the defendant is entitled to get recovery of possession over the counter claim schedule property as prayed for?
6. Whether the defendant is entitled to get permanent prohibitory injunction against the plaintiffs as prayed for?
7. Reliefs and costs.■

4. On conclusion of the trial, the Sub Court concluded that the plaintiffs were not successful in proving the execution of the settlement deeds and that, there exists an apparent conflict between the testimonies of PW2 and PW3, who are stated to be the attesting witnesses, who deposed that they had affixed signatures in the settlement deeds prior to the settler, late Nesamony, affixing his signature. The capacity of the settler to execute the documents was also doubted, and the findings rendered by the executing court in EA No.938/03 were put against the plaintiffs on the application of the principle of res judicata. Accordingly, the suit was dismissed, and the counterclaim was decreed. Aggrieved, the plaintiffs preferred AS No.111/2010 before the Addl. District Court-II, Thiruvananthapuram. The Addl. District Court-II on reappreciation of the evidence and the law as discussed by the trial court came to the conclusion that the appellants/plaintiffs are entitled to succeed in part and accordingly, allowed the appeal in part by affirming the judgment and decree in dismissing the suit, but, however, reversing the judgment and decree in the counterclaim on the ground that the defendant has not sought for cancellation of the documents.

As against the aforesaid judgment, both the plaintiffs and the defendant have come up in RSA Nos.1337/2012 and 108/2013, respectively. While admitting RSA No.1337/2012 on 7.11.2012, the following substantial questions of law were framed:

- 1) Is the title of the plaintiffs barred on account of estoppel by election?
- 2) In the absence of a plea, issue, argument or consideration by the trial court of the question of estoppel by election, is the lower appellate court justified in entertaining and accepting such a plea in appeal?
- 3) When the settlement deeds are held to be voidable documents and no challenge thereto is laid within the time prescribed by law, is not the title of the plaintiffs under the dispositions unimpeachable?
- 4) Is the lower appellate court justified in ignoring the totality of the evidence on the execution and attestation of the settlement deeds and the impact of Sec.71 of the Evidence Act in entering a finding that the documents are not proved?
- 5) Whether the judgment and decree of the lower appellate court confirming the dismissal of the suit is sustainable in law?■

The following are the substantial questions of law framed in RSA No.108/2013 while admitting the matter on 6.2.2013:

(1) Since Ext.A3 and A8 were not proved to have been executed by deceased Desamani, is the lower appellate court justified in holding that the appellants should have sued to set aside the documents?

(2) When the contesting parties have no case that Desamma (the mother of the plaintiff) has any right over the property, is the lower appellate court justified in declining the relief sought for in the counterclaim filed by the appellant/defendant?

5. Heard Sri.P.B.Subramanyan, the learned counsel appearing for the appellants/plaintiffs and Sri.G.Sudheer, the learned counsel appearing for the respondent-appellant in RSA No.108/2013 (counterclaim plaintiff).

6. Sri.P.B.Subramanyan, the learned counsel appearing for the appellants, submitted that both the courts below erred egregiously in appreciating the evidence of PW2 and PW3 to hold that the plaintiffs have not proved the execution of the settlement deeds by late Nesamony. It is further pointed out that unlike the case of a Will, which requires to be proved in terms of the proviso to Section 68 of the Indian Evidence Act, 1872, in a case of settlement deed, there should be a specific denial by the executant himself in order to attract the rigor of the proviso to Section 68, which requires the beneficiary to prove the settlement deeds by examining at least one attesting witness. The defendant has no locus standi to deny execution of the settlement deeds. The trial court, on a perverse appreciation of the evidence of PW2 and PW3, concluded that the attestation of the settlement deeds is not valid. It is nobody's case that the attestation was invalid. But, on contrary, the execution of the settlement deeds is denied by the defendant. Since the settlement deeds are registered documents, there arise a prima facie presumption regarding their execution and that the defendant did not step into the box and gave evidence only through the power of attorney, which is not sufficient to discharge the burden on her to shift the same to the shoulders of the plaintiffs. The finding of the trial court that the suit is barred by res judicata cannot be sustained since no issues were framed on the point. It is further contended that the first appellate court had erroneously found the application of the principle of the doctrine of estoppel. The first appellate court misdirected itself in applying the aforesaid doctrine, despite a clear finding by this Court in WP(C) No.14478/2005, wherein the plaintiffs were given liberty to redress their grievance by filing an appropriate suit for declaration of title. It is further submitted that since the appellant in RSA No.108/2013 had not chosen to set aside the registered documents within three years from the date of knowledge, the prayer in the counterclaim itself is time barred under Article 58 of the Limitation Act, 1963.

7. Per contra, Sri.G.Sudheer, the learned counsel appearing on behalf of the appellant in RSA No.108/2013, contended that both the courts have concurrently found that the settlement deeds were not validly executed and therefore, the courts below have correctly applied the law and the

facts and dismissed the suit and decreed the counterclaim. According to the learned counsel, the first appellate court erroneously reversed the findings of the trial court decreeing the counterclaim. It is further contended that the requirement to set aside the documents will not arise, since according to the appellant/counterclaim plaintiff, the documents are forged documents and hence, void and not binding on her. As regards limitation, it is submitted that since the counterclaim plaintiff has sought recovery of possession, the period of limitation prescribed is under Article 65 and not under Article 58 or 59 of the Limitation Act, 1963. In support of his contention, he relied on the decisions of the Supreme Court in *Shanti Devi (Since Deceased) Through Lrs. Goran v. Jagan Devi* [2025 KHC OnLine 6790] and *Hussain Ahmed Choudhury v. Habibur Rahman (Dead) Through Lrs* [2025 KHC OnLine 6381 : 2025 SCC OnLine 892] and of this Court in *Cherian K.M. v. Ammini* [2025 KHC OnLine 746].

8. I have considered the rival submissions raised across the bar and perused the judgments rendered by the courts below and also the records of the case.

9. Since the substantial questions of law raised in these two appeals are substantially different, this Court deems it appropriate to deal with the substantial questions of law raised in RSA No.1337/2012. The answers to those questions of law will necessarily decide the fate of RSA No.108/2013.

10. The primary reason given by the first appellate court to decline the reliefs in favour of the appellants/plaintiffs is on the ground that the plea of the appellants is hit by the doctrine of estoppel. At the outset itself, this Court fails to comprehend as to how the first appellate court could have bestowed its consideration on this issue without anyone raising the question before it. Therefore, this Court cannot but conclude that extraneous consideration passed on the minds of the first appellate court while deciding the lis. In fact, the first appellate court committed a serious irregularity in holding that the present suit is hit by the doctrine of estoppel. The perverse appreciation of the evidence and the law is writ large on the face of the judgment itself, especially when the first appellate court chose deliberately to ignore the judgment of this Court in WP(C) No.14478/2005 (Ext.A26) granting liberty to the plaintiffs to file an appropriate suit for declaration of title. Therefore, this Court sees no reason to subscribe to the finding rendered by the first appellate court in holding that the present suit is hit by the doctrine of estoppel. Accordingly, the first and second substantial questions of law are answered in favour of the appellants/plaintiffs, and it is held that the suit is not hit by the doctrine of estoppel.

11. The next question to be considered is as to whether the settlement deeds are void or voidable. Since the validity of the settlement deeds is raised, the issue needs to be addressed by this Court before proceeding further. Admittedly, all the settlement deeds are registered. It is beyond doubt that though the deeds are styled as settlement deeds, the same are in effect gift deeds executed in favour of the appellants. If that be so, provisions of Section 123 of the Transfer of Property Act, 1882 apply.

12. In *Prem Singh v. Birbal* [2006 (2) KLT 863], the Supreme Court held that a registered document carries a degree of presumption as regards its execution and therefore, when a document

is valid, no question arises of its cancellation.

13. In *Hari G Nair Vs Santha* [2023(6) KLT 855], a Single Bench of this Court held that a person who relies on the document would, under normal circumstances, be entitled to the benefit of presumption. The burden of proof to prove the non-execution would rest upon the person who challenges the document.

14. The respondent/defendant in her written statement had denied the execution of the documents in question. But then, the question is whether a mere denial is sufficient. Should the defendant be burdened with something more than a mere denial to succeed is the question for consideration here. It must be remembered that unlike a Will, which requires to be proved in terms of the mandate under Section 68 of the Indian Evidence Act 1872, in a case of a settlement deed, the obligation to examine the attesting witness arises only when the executant denies the execution of the deed. Even if it is assumed that, on a mere denial by the defendant, the obligation under Section 68 is attracted, the larger question is whether the settlement deeds require to be specially questioned by the defendant and a consequential relief to cancel the same should be sought for.

15. It is beyond cavil that, in a claim for declaration of title, if a person is confronted with a registered document, there arises a necessity to formally seek for cancellation of the document. If the normal rule as above is applied, it is safe to conclude that the defendant in her counterclaim has not sought to set aside the document. But, the learned counsel for the respondent/defendant would point out that there is no requirement to set aside a void document and hence the defendant is entitled to ignore the same. Extensive reliance is placed on the findings of the execution court in Ext.A26 order, wherein the validity of the documents was gone into. True, when a document is void ab initio, a decree for setting aside the same may not be necessary, since the same is non est in the eyes of the law as it could be nullity.

16. In *Shanti Devi (Since Deceased) Through Lrs. Goran v. Jagan Devi* [2025 KHC OnLine 6790], the Supreme Court held that notwithstanding Article 59, Article 65 will apply in a case where a document is void ab initio and that a suit for possession based on the period of limitation under Article 65 is perfectly maintainable.

17. The learned counsel for the respondent/defendant placed extensive reliance on the above decision to contend that the defendant need not seek cancellation of the document, which is void. This Court is afraid that the facts leading to the decision of the Supreme Court are slightly different from the present case. In the case before the Supreme Court, a sale deed was executed by a person who had no authority to execute the same. The plaintiff claimed recovery of possession on the strength of his/her title as per the gift deed. However, in the facts of the present case, the defendant had no case that late Nesamony had no authority to execute the settlement deeds. The contention to the contrary is that the settlement deeds are executed by playing fraud. If that be so, when a claim for declaration of title is raised relying on the settlement deeds, it cannot be said that the defendant can sustain the claim without seeking to cancel the documents. This is more so when the defendant had no case that, when the settlement deeds were executed, late Nesamony had no right title and interest over the property. In short, the competence of late Nesamony to execute the

settlement deed is not under dispute.

18. For cancellation of a document, the time limit prescribed is 3 years from the date on which the facts entitling the person to seek cancellation arise. The relevant Article which governs the field is Article 59 of the Limitation Act, 1963. When a registered document is sought to be avoided and a declaration as regards the title is sought for, necessarily, without setting aside the document, the reliefs for declaration and recovery of possession cannot be granted and, therefore, the relevant article which is applicable is Article 59 of the Limitation Act, 1963 and not Article 65, because without setting aside the document, recovery of possession cannot be ordered. Therefore, the contention of the respondent/defendant that in view of Article 65, which governs a larger period of limitation, she is entitled to ignore the lesser period of limitation is unacceptable. At any rate, in the absence of any prayer for setting aside the documents, the application of Article 65 of the Limitation Act, 1963 does not arise at all for consideration.

19. In *Hussain Ahmed Choudhury and Others v. Habibur Rahman (Dead) through Lrs. and Others* [2025 SCC OnLine 892], the Supreme Court considering the purport of Section 31 of the Specific Relief Act, 1963 held as follows:

“24. This observation made in *Sk. Golam Lalchand v. Nandu Lal Shaw* [2024 SCC OnLine SC 2456] (supra) must necessarily be understood in the context of our preceding discussion. All that has been stated therein is that as Section 31 of the Act, 1963 uses the word “may”, it is not a mandate, even as regards the parties to the instrument or the persons claiming through or under them, to seek for the cancellation of an instrument which is otherwise void and therefore, it cannot be contended that a stranger to that instrument must necessarily seek for its cancellation. By no stretch of imagination can this be construed to mean that when there exists an instrument with respect to the same property but executed by some other person, the plaintiff despite being a stranger to that instrument would fall under the scope of “any person” in Section 31 of the Act, 1963.”

Affirming the views of the Madras High Court in *Muppudathi Pillai v. Krishaswami Pillai & Ors* [1959 SCC OnLine Mad 314] and *Sk. Golam Lalchand v. Nandu Lal Shaw alias Nand Lal Keshri alias Nandu Lal Bayes & Ors* [2024 SCC OnLine SC 2456], the Supreme Court held that any person referred to under Section 31 of the Specific Relief Act, 1963 cannot include a third party or a stranger to that instrument.

20. The learned counsel appearing for the appellant in RSA No.108/2013 asserted before this Court that the point of law raised in these appeals is covered by the decision of the Supreme Court in *Hussain Ahmed Choudhury* (supra). On a close reading of the aforesaid judgment rendered by the Supreme Court, this Court is of the considered view that the contention of the appellant is untenable. This is for the reason that the decision of the Madras High Court in *Muppudathi Pillai* (supra) dealt with a plea under Section 39 of the Specific Relief Act, 1877 and that the expression “any person” does not include a third party, but is restricted to a party to the written instrument or any person who can bind such party and that the relief under Section 39 of the Specific Relief Act, 1877 was confined to be granted only in respect of an instrument likely to affect the title of the plaintiff, and not of an instrument executed by a stranger to that title.

21. In *Md. Noorul Hoda v. Bibi Raifunnisa & Ors* [(1996) 7 SCC 767], it was held that the expression "person" in Section 31 of the Specific Relief Act has been held to include a person seeking a derivative title from his seller. In this context, it is pertinent to note that the Supreme Court in *Hussain Ahmed Choudhury* (supra) also held that when the executant of a deed wants it to be annulled, he must seek cancellation of the deed under Section 31 of the Specific Relief Act, 1963. But if a non-executant seeks annulment of the deed, he has to only seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him.

22. When the facts intertwined in the present appeals are closely scrutinized, the counterclaim plaintiff/appellant in RSA No.108/2013 cannot have any right title and interest over the property in the normal course of inheritance. But, since deceased Nesamony had no issues in the first marriage, the defendant becomes the only natural legal heir. But, then, it is indisputable that Nesamony married Dasamma, who had already four children in the wedlock with Simson. Therefore, necessarily, the position of the deceased Nesamony is that of a stepfather, who is stated to have executed the settlement deeds in favour of the plaintiffs. The defendant/counterclaim plaintiff cannot contend that she has the right title and interest over the plaint schedule property because of the derivation of title through other sources. In fact, the counterclaim plaintiff also claims title under late Nesamony as a legal heir in terms of the provisions of the Hindu Succession Act, 1956. Therefore, when an intestate succession is claimed by the plaintiffs relying on testamentary disposition of the property through settlement deeds, without seeking to set aside or for cancellation of the documents, the counterclaim plaintiff cannot successfully sustain the plea of declaration of title. No consequences will follow from the prayer seeking recovery of possession because the plea for recovery of possession can be sustained only on finding that the counterclaim plaintiff has got title over the plaint schedule property consequent to a finding on the validity of the settlement deeds. Therefore, the reliance placed on by the learned counsel for the appellant in RSA No.108/2013 that the larger period of limitation under Article 65 of the Limitation Act is to be applied, is untenable.

23. In *Janardhanam Prasad vs Ramdas* [(2007) 15 SCC 174], the Supreme Court held that when a document is registered, a deemed notice of the said fact can be construed, going by Explanation-III to Section 3 of the Transfer of Property Act, 1882. Still further, the registered documents in the form of settlement deeds were already produced before the executing court in EA No.353/2003. The counterclaim plaintiff may argue that, in the light of the findings rendered by the executing court, she was not bound to sue for setting aside those documents. But, then, the findings rendered by this Court in WP(C) No.14478/2005 would necessarily operate against her. Therefore, as soon as a fresh suit was filed, necessarily, it was necessarily incumbent upon the counterclaim plaintiff to have sued for cancellation of the said documents.

24. In the light of what is discussed above, this Court answers the third substantial question of law in favour of the appellants/plaintiffs and holds that since no challenge was raised against settlement deeds within the prescribed time provided under the law, the title of the plaintiffs under the dispositions is unimpeachable.

question beckons before this Court is as regards the obligation on the part of the counterclaim plaintiff to prove the execution of the settlement deeds. It must be remembered that in the present case, the execution is denied by a person other than the executant. The plea raised is not one of undue influence but fraud. It is trite law that registration is a prima facie proof regarding execution. Though the denial is vague, the first appellate court took the view that as soon as there is a denial of execution, it is incumbent upon the defendant to prove the requirement of law as per the mandate contained under Section 68 of the Indian Evidence Act, 1872. In *Surendra Kumar v. Nathulal and Another* [2001 (5) SCC 46], the Supreme Court, considering the requirement of law under the proviso to Section 68 of the Indian Evidence Act, 1872, held that the application of the proviso to Section 68 of the Indian Evidence Act will arise only if the execution is denied by the executants himself and not otherwise.

33. Be that as it may, this Court has already found that there is nothing in the evidence of PW3 to show any inconsistency as regards the execution of the settlement deeds. The evidence of PW2 also shows that he had spoken about the deceased Nesamony executing the settlement deeds, although he affixed his signature before Nesamony had affixed his signature. This Court is of the considered view that it is wholly impermissible to single out the statement made by PW2 to hold that there is no valid attestation, especially since there is no pleading with regard to the lack of proper attestation on the settlement deeds in the counterclaim. Resultantly, this Court holds that the first appellate court erred in ignoring the totality of the evidence in the execution and attestation of the settlement deeds and the impact of Section 71 of the Indian Evidence Act, 1872. As a result of the above, the consequences should follow and answering the fifth question of law, this Court holds that the dismissal of the appeal confirming the dismissal of the suit is unsustainable in law.

34. As a result of the above discussion, this Court finds that the answers to the substantial questions of law raised in RSA No.108/2013 are only consequential. Therefore, in the light of what is discussed above, the substantial questions of law framed in RSA No.108/2013 are answered against the appellant/counterclaim plaintiff and in favour of the respondents therein/plaintiffs. Accordingly, RSA No.108/2013 is dismissed.

Resultantly, this Court is of the considered view that RSA No.1337/2012 deserves to be allowed by reversing the judgment and decree dated 10.6.2010 in OS No.180/2006 of the Sub Court, Neyyattinkara as confirmed in AS No.111/2010 by the Addl. District Court-II, Thiruvananthapuram and I do so. Consequently, the suit will stand decreed as prayed for. The title of the plaintiffs/appellants over the plaint schedule property is declared. The respondents/ legal heirs of the original defendant are restrained by a prohibitory injunction from trespassing into the plaint schedule property, demolishing the separating compound wall or committing any waste to the plaintiffs' residential building or shed therein or committing any sort of waste in the plaint schedule property. Consequently, the counterclaim raised by the original defendant will stand dismissed. The plaintiffs are entitled to costs throughout the proceedings.