

## Vamaloohana Vs Ajayakumar and V. Salimkumar

**Court:** High Court Of Kerala

**Date of Decision:** May 26, 2010

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 21 Rule 97

**Hon'ble Judges:** Thottathil B. Radhakrishnan, J; S.S. Satheesachandran, J

**Bench:** Division Bench

**Advocate:** M. Dinesh, for the Appellant; No Appearance, for the Respondent

**Final Decision:** Dismissed

### Judgement

Thottathil B. Radhakrishnan, J.

The Execution first appeal is filed with a petition to condone an enormous period of delay of more than six

years. The plea in support of the application for condonation of delay is that the appeal was wrongly presented before the District Court, that it

was entertained, but ultimately returned for presentation before the proper court. With this, we examined whether the appellant/petitioner has a

prima facie case for admission of the execution first appeal.

2. The 1st respondent sued the 2nd respondent on a strength of an agreement for sale. The title held out by the 2nd respondent was on the basis of

a gift to him by his mother. The appellant is the 2nd respondent's mother.

3. When the decree was put in execution, the appellant filed an application invoking Order XXI Rule 97 of the CPC challenging the gift deed

shown to have been executed by her in favour of her son, the defendant/judgment debtor. In support, another son of the appellant was examined.

Though a commissioner was deputed, the appellant could not give evidence.

4. Whatever be the quality of the evidence on record, we are clear in our mind that an application under Order XXI Rule 97 of the CPC cannot be

filed on the basis of the aforesaid facts. The appellant/petitioner admits the existence of the settlement deed by her in favour of her son, the 2nd

respondent. If that be so, her right, if any, to challenge that deed, cannot be established making an application under Order XXI Rule 97 of the

CPC. We do not express anything on her right otherwise, though the learned Counsel argued that the appellant may have a right to sue for setting

aside that document.

5. For the aforesaid reasons, we do not find any reason to entertain this execution first appeal. Accordingly the C.M. Application and the

execution first appeal are dismissed.