Kerala High Court
995Yadan Kandy Puthan Purayil ... vs Unnirankutty on 30 July, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

AS.No. 441 of 1995(D)

1. 1995YADAN KANDY PUTHAN PURAYIL MATHUAMMA
... Petitioner

Vs

1. UNNIRANKUTTY
... Respondent

For Petitioner :K.P.BALASUBRAMANIAN

For Respondent :SRI.K.P.DANDAPANI,A.V.M.SALAHUDDEEN

The Hon'ble MR. Justice A.K.BASHEER
The Hon'ble MR. Justice P.S.GOPINATHAN

Dated :30/07/2009

O R D E R

A.K.BASHEER & P.S.GOPINATHAN, JJ.

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A.S.Nos.441 & 556 OF 1995

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Dated this the 30th day of July, 2009

JUDGMENT

Basheer, J:

These two appeals are directed against the decree and judgment passed in a suit for partition. While A.S.441/95 is at the instance of the plaintiffs, the other appeal viz. A.S.556/95, has been preferred by the two contesting defendants, namely, defendant Nos.1 and 2 in the suit.

2. By the impugned decree and judgment, the court below held that item No.I of the A schedule as well as the movables in B schedule were not available for partition. However, the court below granted a decree for partition in respect of item No.2 of A schedule.

3. The plaintiffs in their appeal contend that the court below was not justified in disallowing partition in respect of item No.1. The contention of the contesting defendants in their appeal is that the court below committed serious illegality in ordering partition of item No.2, since according to them the said item had never been treated or enjoyed as a thavazhi property.

4. The case of the plaintiffs may be briefly noticed.

5. Item No.1 of the plaint A schedule originally belonged to Kunnakkandi Kelu, the common ancestor of the plaintiffs and defendants 1 to 4. Sri.Kelu passed away about 50 years prior to the institution of the A.S.Nos.441 & 556 OF 1995 :: 2 ::

suit. According to the plaintiffs, the said item of property was enjoyed by Kelu's wife Kunki Amma and her lineal descendants as thavazhi property eversince Kelu's death. As regards item 2, the contention of the plaintiffs was that it was acquired by Kunki Amma, wife of Kelu, in her name as well as in the name of her children to be enjoyed as a thavazhi property.

6. Kunki Amma had five children in her wedlock with Kelu. They were Pennutty, Kalliani, Sankaran, Unirankutty (D1) and Govindan (D2). Kalliani and Sankaran died without issues. Plaintiff No.1 is the daughter of Pennutty. Plaintiffs 2 to 6 and defendants 3 and 4 are the children of plaintiff No.1. Plaintiffs 7 and 8 are children of plaintiff No.3. As has been noticed already, defendants 1 and 2 are the brothers of Pennutty mentioned above.

7. Plaintiffs contended that plaintiff No.1 was entitled to get 7/42 shares and plaintiffs 2 to 8 would get 3/42 shares each in the plaint schedule properties. Thus the plaintiffs claimed 28/42 as a "single unit". According to the plaintiffs, defendant 1 and 2 would be entitled to get 4/42 shares each and defendants 3 and 4 would get 3/42 shares each. The further contention of the plaintiffs was that the movables described in the B schedule were available in the residential building situated in item No.1 and therefore they were also liable to be partitioned.

8. Defendant No.5 was impleaded in the suit, since he had A.S.Nos.441 & 556 OF 1995 :: 3 ::

admittedly purchased an extent of 6 cents of land from item 2 of the plaint A schedule property from defendant Nos.1 and 2 about 16 years ago.

9. Defendants 1 and 2 in their joint written statement, refuted and denied the entire allegations in the plaint. It was contended by them that neither the two items of immovable property in the plaint A schedule nor the movables in the B schedule, were available for partition. It was however admitted that the parties were members of saliya community and that they were following Marumakkathayam Law of inheritance. But the contention of the plaintiffs that they were members of Thiyyadankandi Puthanpurayil Kunki Amma's thavazhi was specifically denied. However, it was conceded that item No.1 of the plaint A schedule belonged to Kunnakkandi Kelu, their father. But the specific contention of these defendants was that the said item was never treated or enjoyed as thavazhi property after the death of Kelu. As regards item No.2, it was contended by these defendants that the said item belonged to late Kunki, their mother. After the death of Kunki, the said

property was inherited by her children and it was never treated or enjoyed as thavazhi property. Defendant No.1 further refuted the allegation that he was in management of the property as thavazhi karanavar. In short, the contention of these two defendants was that the two items of properties described in A schedule were not available for partition.

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10. The court below while considering issue nos.1 and 2 which related to the question whether the plaint schedule properties belonged to the thavazhi and also whether plaintiffs and defendants 1 to 4 had got any partible right in those properties, held that item No.2 of the A schedule was available for partition and the parties were entitled to get the shares as set out in the plaint.

11. As regards item No.1, the learned Judge observed that the learned counsel for the plaintiffs had fairly submitted that it may not be possible for the plaintiffs to substantiate the claim for partition in respect of the said item in the absence of any documents in support thereof. Similarly, the learned Judge also found that the movables described in B schedule were not available for partition, since the plaintiffs had not adduced any satisfactory evidence in this regard.

12. The point that arises for consideration is whether any interference is warranted with the findings entered by the court below as regards both these items of properties. To put it differently, are these properties liable to be partitioned as thavazhi properties?

13. Sri.K.P.Balasubramanian, learned counsel for the appellant in A.S.441/95, submits that his counter part in the court below was totally misunderstood by the learned Judge to have conceded that the plaintiffs did not have any document or evidence to substantiate their claim for A.S.Nos.441 & 556 OF 1995 :: 5 ::

partition of item no.1. We pointed out to the learned counsel that the remedy for the plaintiffs would have been to seek a review of the judgment if in fact the submission made by the learned counsel for the plaintiffs before the court below was not properly understood by the learned Judge.

14. It must be remembered that nearly 15 years have elapsed after the disposal of the suit. Sri.Balasubramanian, learned counsel for the plaintiffs, made a very persuasive and impassioned plea to give the plaintiffs an opportunity to seek a review and also to adduce further evidence if permitted by this court. We are not at all impressed with or inclined to accept the above plea not only for the reason that such a procedure will protract the matter further resulting in grave miscarriage of justice to all the parties. Nevertheless we deem it fit and proper to examine whether there are any materials or evidence to show that item no.1 is also available for partition as contended by the plaintiffs.

15. It is beyond controversy that item no.1 was acquired by the common ancestor of the plaintiffs and defendants, namely, Kelu who admittedly passed away about 50 years prior to the institution of the suit. It is significant to note that the contesting defendants (defendants 1 and 2) had not seriously disputed or questioned the availability of the properties for partition though of course they

had stated in their written statement that they were not partible as thavazhi properties. The relevant portions A.S.Nos.441 & 556 OF 1995 :: 6 ::

in the written statement of defendant Nos.1 and 2 are extracted hereunder:

> "It is true that the property described in item No.1 in the schedule belonged to Kunnakandi Kelu, the father of these defendants. But the further averment contained in the plaint that the property devolved on the thavazhi is false to the knowledge of the plaintiffs. The year of his death as stated in the plaint is also incorrect. It is also incorrect to say that the property was enjoyed by the plaintiffs and defendants as thavazhi property. The allegation that the house has been reconstructed in the property using thavazhi funds is untrue.
>
> The averments contained in para 3 of the plaint that item No.2 was acquired by the members of the thavazhi for and on behalf of the thavazhi is incorrect. The property belonged to late Kunki, the mother of these defendants and on her death her children have inherited the estate. The averments contained in para 3(v) of the plaint that the properties are held as 'puthravakasa thavazhi' is also incorrect. The allegation that the 1st defendant was in management of the property in the capacity as Karanavar till 1976 is incorrect. Kunki Amma died after the passing of the Hindu Succession Act. The devolution of shares as stated in para 3(vI) of the plaint is also incorrect.
>
> Plaintiffs have no partible interest in the plaint property.

As such the suit for partition is not maintainable in law, The remaining parties to the suit are also not entitled to claim any right over the property. The property is not partible as A.S.Nos.441 & 556 OF 1995 :: 7 ::

claimed in the plaint.

The Joint Family System Abolition Act referred to in para 3 of the plaint is not applicable to the facts of the case and the property is never held as thavazhi property. The property is not divisible among the parties as Tavazhi property of Kunki Amma or Kelu.

The properties described as item 1 in the schedule was the individual property of late Kelu." (emphasis supplied by us)

16. The above averments in the written statement will unambiguously show that defendants did not have a case that item No.1 was not available for partition. The only question was whether or not it was to be divided as though it is a thavazhi property.

17. Learned counsel for the plaintiffs would contend that item No.1 had all along been treated and enjoyed as a thavazhi property along with item No.2 by the thavazhi members eversince the death of Kelu. He further points out that the family members had been residing in the ancestral home

situated in item No.1. In this context, learned counsel invites our attention to certain documents produced by the parties before the court below. Exts.A1 and A2 ofcourse relate to item No.2 with which we will deal a little later.

18. Defendant No.1 has been described as the Karanavar and administrator of 'Cheekkadankandi Puthravakasha thavazhi'. The name of item No.1 in the plaint schedule is also "Cheekkadankandi parambu". The A.S.Nos.441 & 556 OF 1995 :: 8 ::

contention of the learned counsel is that the description of defendant No.1 as the Karanavar and administrator of Cheekkadankandi puthravakasha thavazhi tharavadu and also the fact that the said item of property is known in the same nomenclature will conclusively prove that the said property was being enjoyed as a thavazhi property. Similarly, the fact that the entire family members had been residing in the tharavadu house will also show that it was being treated and enjoyed as a tavazhi property. A perusal of the pleadings of the contesting defendants and also the fact that the ancestral home is situated in item no.1 will undoubtedly show that the said item of property will also be available for partition. To that extent, we are inclined to agree with the counsel for the plaintiffs and therefore the finding entered by the court below that item No.1 is not available for partition is liable to be vacated. We do so.

19. The next question is whether the said item of property (item no.1) has to be divided as though it is a thavazhi property or as an individual property of Kelu which devolved on his wife and children after his death. Learned counsel for the plaintiffs would submit that the fact that the family was known as Cheekkadankandi thavazhi will undoutedly show that item No.1 had all along been enjoyed as a thavazhi property. In this context, learned counsel invites our attention to Ext.A4 in addition to Exts.A1 and A2 referred to by us earlier. It is true that Ext.A4 mortgage A.S.Nos.441 & 556 OF 1995 :: 9 ::

deed was executed by defendant No.1 in favour of plaintiff No.1 in the year 1954. Defendant No.1 was described as "thavazhi karanavar and administrator" of Cheekkadankandi puthravakasam thavazhi. Learned counsel submits that even in the year 1954, defendant No.1 continued to be the thavazhi karanavar and administrator of the entire thavazhi and therefore it has to be assumed that item No.1 was also being enjoyed as a thavazhi property even at that time. We are unable to agree.

20. The mere fact that the name of the property was adopted by defendant No.1 to describe himself as thavazhi karanavar and administrator may not be a reason to assume that the said property had all along been treated as a thavazhi property. In this context, it may be noticed that the plaintiffs and contesting defendants are known by their family name, viz. Cheekkadankandi puthanpurayil. None of them did have a case that the description given in the plaint was wrong. It may be true that in some documents defendant No.1 might have described himself as Cheekkadankandi thavazhi karanavar. This might have been done only because he was the eldest male member then alive and also since the family house was situated in that property. For that reason alone, it cannot be assumed that the said property was being enjoyed by the family members as a thavazhi property. For that reason alone the contention raised by the learned counsel for the plaintiffs that item No.1 has to be A.S.Nos.441 & 556 OF 1995 :: 10 ::

treated as a thavazhi property and should be divided as such among the thavazhi members cannot be accepted.

21. More importantly, there is absolutely no other corroborative evidence to substantiate the above contention. Not even a single document has been produced to show that after Kelu's death item No.1 was ever treated or enjoyed as a thavazhi property. As mentioned by us earlier, admittedly, Kelu had acquired item No.1 in his name and after his death, it had devolved on his wife and children. If at a later point of time the parties had decided to treat the said item as a thavazhi property, there must have been some other documents or circumstances to indicate so. In the absence of any such materials, we are not able to accept the plea of the learned counsel for the plaintiffs to hold that item No.1 has to be treated as a thavazhi property.

22. As regard item No.2, the situation is totally different. Exts.A1 and A2 will undoubtedly show that the property was acquired by first plaintiff (who at that time was a minor and therefore represented by her mother Pennutty) defendants 1 and 2 and also by Pennutty, Kalliani, Sankaran and Govindan apart from Kunki amma, their mother on mortgage right (Kanam right). More importantly the minor plaintiff No.1 was one of the beneficiaries of the document. It may be remembered that plaintiff No.1, the grand daughter of late Kelu and her mother Pennutty, A.S.Nos.441 & 556 OF 1995 :: 11 ::

were alive at the time of execution of Exts.A1 and A2. If infact the parties wanted to acquire the property only in the name of wife and children of Kelu, there was no reason why grand daughter of Kelu would have been made a beneficiary under that document. This clearly indicates that the intention of the parties was to enjoy item no.2 as a thavazhi property. In that view of the matter, we do not find any illegality in the finding entered by the court below that item No.2 is available for partition as a thavazhi property. Therefore, it is held that item no.2 has to be divided among the thavazhi members.

23. In this context, we may also refer to one other contention raised by the contesting defendants with reference to Ext.B1. The contention is that Pennutty, the mother of plaintiff No.1 assigned away her 1/3rd right in the plaint schedule properties in favour of defendant No.1 and 2. Placing reliance on this document, it is contended by learned counsel for the appellants in A.S.556/95 that whatever right the predecessor of plaintiffs and defendant 3 and 4 had in the property, had already been assigned away by their predecessor and therefore neither the plaintiffs nor defendant 3 and 4 had any manner of subsisting right in the plaint schedule properties.

24. In response to the above contention, it is submitted by learned counsel for the plaintiffs that as far as item No.2 is concerned, their A.S.Nos.441 & 556 OF 1995 :: 12 ::

predecessor Pennutty could not have relinquished or given up her right, since it had all along been treated and enjoyed as a thavazhi property. Moreover, Mathu, plaintiff No.1 and mother of other plaintiffs was a beneficiary under Ext.A2. Learned counsel further points out that item No.2 being a thavazhi property, Ext.B1 would have no binding force or validity as far as item No.2 is concerned. It is further contended by the learned counsel that the specific case of the plaintiffs was that

Smt.Pennutty was all along under the care and custody of defendant No.1 and 2. She was an illiterate lady. She might not have been aware of what the contents of the document were, even assuming she had executed the same. The plaintiffs had specifically contented that Ext.B1 was got executed by defendant No.1 and 2 by threat and coercion or misrepresentation. Learned counsel submits that the said contention raised by the plaintiffs in their rejoinder had not been controverted by the defendants.

25. But it may be noticed that Ext.B1 document was executed way back on April 19, 1972. Admittedly, it is a registered document, the validity of which cannot be questioned and challenged unless it is proved by cogent evidence that it was a product of coercion, misrepresentation, etc. as alleged by the plaintiffs. Significantly, plaintiffs had not adduced any evidence in this regard though ofcourse they had raised only a bald A.S.Nos.441 & 556 OF 1995 :: 13 ::

contention that Pennutty was forced to execute such a document. In that view of the matter, we are unable to accept the plea that Ext.B1 was not binding either on Pennutty or her legal heirs. In short the right available to Pennutty in item No.1 had been assigned away by her in 1972. Therefore, the plaintiff and defendants 3 and 4 will not be entitled to get any share in item No.1. But since plaintiff No.1 was a beneficiary under Ext.A1 mortgage deed, her individual right in item No.2 will remain intact even though Pennutty had relinquished her right in that property.

26. We have already mentioned that there is no serious dispute about the shares to which the parties are entitled as set out in the plaint. The defendants have not seriously disputed the same. In that view of the matter, we uphold the said finding entered by the court below. As regards the movable items in plaint B schedule also, we do not find any material illegality in the finding entered by the court below that they are not partible.

27. As regard the case set up by defendant No.5 that he was a bonafide purchaser of six cents of land from defendant No.1 and 2 is concerned, the court below has held that the claim of defendant No.5 shall be considered during final decree proceedings and the shares allottable to defendant No.1 and 2 shall be allotted to defendant No.5. We find no reason to disturb the said finding.

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28. In the result, it is held that item No.1 of plaint A schedule is not available for partition as a thavazhi property. But as far as item No.2 is concerned, the finding entered by the trial court is affirmed. The impugned decree and judgment are upheld.

Both appeals are dismissed. All the pending interlocutory applications are closed.

(A.K.BASHEER, JUDGE) (P.S.GOPINATHAN, JUDGE) jes.

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A.K.BASHEER & P.S.GOPINATHAN, JJ.

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JUDGMENT Dated 30thJuly, 2009