

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 14TH DAY OF JULY 2015/23RD ASHADHA, 1937

AS.No. 250 of 1997 (C)

OS 413/1992 OF SUBORDINATE JUDGE'S COURT, THALASSERY DATED 13-11-1996

PLAINTIFFS/APPELLANTS:

1. MALAYALANDIYIL KAYAKOOL EDAKOZHI SUBAIR,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.
2. MALAYALANDIYIL KAYAKOOD EDAKOZHI NASEEMA,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.

BY ADV. SRI.R.PARTHASARATHY

DEFENDANTS/RESPONDENTS:

1. KAYYALAKKAKATH KUNHAMINA UMMA,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.
2. KAYYALAKKAKATH KUNHALUMMA, -DO-
3. KAYYALAKKAKATH RUKIYA, -DO-
4. MALAYALANDIYIL KAYAKOOL EDAKOZHI KUNHIPATHUMMA,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.
5. MALAYALANDIYIL KAYAKOOL EDAKOZHI, RAZHEEDA UMMA, -DO-
6. MALAYALANDIYIL KAYAKOOL EDAKOZHI REHIYANANTH, -DO-
7. KAYYALAKKAKATH MUHAMMED,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.
8. KAYYALAKKAKATH HUSSAIN, -DO-
9. KAYYALAKKAKATH SAKREENA, -DO-

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10. KAYYALAKKAKATH MAYAN,
KANDANKUNNU AMSOM, MARUVAMPAI DESOM,
THALASSERY TALUK.
 11. KAYYALAKKAKATH ABDULLA, -DO-
 12. KAYYALAKKAKATH REMLA, -DO-
 13. KAYYALAKKAKATH SUHARA, -DO-
 14. KAYYALAKKAKATH REHIYA, -DO-
 15. KAYYALAKKAKATH ABDULRAHIMAN, -DO-
 16. KAYYALAKKAKATH USMAN,
KANDANKUNNU AMSOM, MARUVAMBAI DESOM,
THALASSERY.
 17. KAYYALAKKAKATH GAFOOR, -DO-
 18. KAYYALAKKAKATH BEEBI, -DO-
 19. KAYYALAKKAKATH MARIYA, -DO-
 20. KAYYALAKKAKATH AFSATH, -DO-
 21. KAYYALAKKAKATH UMER, -DO-
 22. KAYYALAKKAKATH AYISA, -DO-
 23. KAYYALAKKAKATH KUNHAMINA, -DO-
 24. MERUVAMBAI KITHUMATHUDHIN SABHA,
P.O. NEERVELI.
 25. NITTOOKANDY ABDURAHIMAN, (PO) NEERVELI.
 26. KAYYALAKKAKATH KHADEESU, (PO) NEERVELI.
 - * 27. KOTTARATHIL ABDULLA, (PO) NEERVELI. (DIED)
 28. KANDOTH IBRAHIM, KUTHUPARAMBA AMSOM,
AMBILAD DESOM.
 29. CHENATH KAYYALAKKAKATH ABDULKHADER,
POYIL VALAPPIL, MERUVAMBAI, P.O. NEERVELI.
 30. CHENATH KHADER, FATHIMA MANZIL,
THOKKILANGADI, AMBILAD DESOM,
REPRESENTED BY POWER OF ATTORNEY
HOLDER M.M. KUNHAMMED HAJI.

Msv/

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31. SECRETARY, WAKAF BOARD, ERNAKULAM.
32. MANNAPPATTINHETALAT KUNHAMMAD HAJI,
KUTHUPARAMBA AMSOM, AMBILAD DESOM.
33. CHENOTH KAYYALAKKAKATH MARIYUMMA, -DO-
34. CHENOTH KADEEJA, -DO-
35. CHENOTH ABDUL AZEEZ, -DO-
36. CHENOTH JABBAR, -DO-

* ADDITIONAL R37 TO R44 IMPEADED

37. FATHIMA, D/O.LATE KOTTARATHIL ABDULLA,
CHERAKANDI HOUSE, MERUVAMBU (P.O.),
NEERVELI (VIA), NIRMALAGIR, PIN - 670 701.
38. ASHARAF, S/O. -DO- -DO-
39. RUHOOT, S/O. -DO- -DO-
40. ASMA, -DO- -DO-
41. SIDHIQUE, S/O. -DO- -DO-
42. ISHAQ, S/O. -DO- -DO-
43. AYSHA, D/O. -DO- -DO-
44. RAMLA, D/O. -DO- -DO-
- * LEGAL HEIRS OF DECEASED 27TH RESPONDENT ARE IMPEADED AS
ADDITIONAL RESPONDENTS 37 TO 44 VIDE ORDER DTD.11.6.2015 IN
IA.168/2012.

R1 BY ADV. SRI.M.A.MANHU
R15 BY ADV. SRI.MVS.NAMBOOTHIRY
R17 BY ADV. SRI.P.A.ABDUL JABBAR, SC, WAKF BOARD
R24 BY ADV. SRI.T.C.MOHANDAS
R31 BY ADVS. SRI.M.M.SAIDU MUHAMMED, SC
SRI.K.SHIBILI NAHA, SC
R30 & R38 BY ADV. SRI.POOVAMULLE PARAMBIL ABDULKAREEM
R33, 34, 35 & 36 BY ADVS. SRI.C.KHALID
SRI.N.GOPINATHA PANICKER
SRI.T.P.SAJID
SMT.NAMITHA JYOTHISH

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 26-06-2015,
THE COURT ON 14-07-2015, DELIVERED THE FOLLOWING:

msv/

C.R.

P.B.SURESH KUMAR, J.

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A.S. No.250 of 1997.

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Dated this the 14th day of July, 2015.

J U D G M E N T

The plaintiffs in a suit for partition are the appellants. The plaint schedule properties belonged to one Makki. The first defendant is the wife of Makki. On the death of Makki, the properties held by him were partitioned by his legal representatives as per Ext.A1 partition deed. The plaint schedule properties are properties allotted to the share of the first defendant in Ext.A1 partition deed. The case of the plaintiffs is that the plaint schedule properties were allotted to the first defendant as per the said partition deed only for her enjoyment during her lifetime and the children of Makki continued to be the co-owners in respect of the said properties. According to the plaintiffs, during the lifetime of the first defendant itself, one of the sons of Makki namely Kunhammed

assigned his 1/7th right in the plaint schedule properties to plaintiffs and defendants 5 to 7 as per Ext.A2 assignment deed on 22.9.1972. The case of the plaintiffs is that in the light of Ext.A2 assignment deed, the plaintiffs are entitled to 1872 out of 32760 shares in the plaint schedule properties and the suit was filed for partition of the said right of the plaintiffs.

2. The defendants contested the suit contending mainly that the plaintiffs had not obtained any right over the plaint schedule properties on the basis of the assignment made by Kunhammed as the first defendant had absolute right over the properties till her death. They also contended that in the course of time, as permitted by the first defendant, the plaint schedule properties were partitioned among the children and the legal representatives of the pre-deceased children of Makki as per a partition deed executed on 19.1.1976. According to the said defendants, the plaintiffs were also represented in the said partition deed and therefore, at any rate, they are not entitled to the relief sought in the suit.

3. Among the issues settled for trial, issue No.4 was

whether the plaint schedule properties are partible. The trial court, on a consideration of the pleadings and evidence on record, found on issue No.4 that the clause in Ext.A1 partition deed restricting the right of the first defendant in alienating the plaint schedule properties is invalid under Section 10 of the Transfer of Property Act; that the first defendant was the absolute owner of the plaint schedule properties at the time of execution of Ext.A2 assignment deed and that therefore the plaintiffs have not acquired any right over the plaint schedule properties as per the said document. Consequent on the said finding, the suit was dismissed without deciding the remaining issues. The appellants are aggrieved by the said decision of the trial court and hence this appeal.

4. Heard the learned counsel for the appellants and the learned counsel for the respondents.

5. The learned counsel for the appellants, relying on the decision of this Court in **Ammukutty Amma v. Viswantha Iyer** (1986 KLT 905) contended that in a partition of family properties between co-owners, no transfer of property is

involved and therefore, Section 10 of the Transfer of Property Act has no application. According to the learned counsel, even though the plaint schedule properties were allotted to the first defendant for enjoyment during her life time, the property continued to be that of the children of Makki and as such the plaintiffs have acquired the fractional right in the plaint schedule properties as claimed by them in the suit.

6. In the aforesaid facts and circumstances, the only issue that falls for consideration in this appeal is as to whether the restrictions imposed on the first defendant as per the terms of Ext.A1 partition deed are hit by Section 10 of the Transfer of Property Act. The relevant portions of Ext.A1 partition deed read thus:

""1&LU jNòWLq]Rp yUmÌ]\yV 1&LU jNòWLq] nLY] R\ÿaO"OĐ kY]Wp]Rs y~³/₄O"¥ 1&LU jNòWLq] fR£ ^}v] fWLsU oOuOvç RRWvwU Rv\ÿOU k]q]RvaO³/₄OU vSq^ofOU A°RjpOç WLS^ot]□ A kY]Wp]Rs y~³/₄O"tORa ^Ó] kOrÕLaV CñW¥ 1&LU jNòWLq] RWLaO³/₄OU Aa\ÿOU vSq^ofOU y~³/₄O"t]□ Sv°VRÕY RWL³/₄V, \]ç□ AjOnv kOi]RÕaO³/₄□

oOfsLp NkvQ^{3/4}]WtOU 1&LU jNòWLq] R\pÅOU, R\á]\ÿOU
vqOÐfsæLRf kÿ]Wp]Rs y^{~3/4}O`¥ pLRfLqO v]SijpOU Dç
SqX NkWLqvOU pLRfLqL¥`OU WaRÕaO^{3/4}LSjL 1&LU
jNòWLq]`V A kÿ]Wp]Rs y<sup>~3/4</sup>O`Rt yUml]\ÿV pLRfLqi]
WLqvOU AvWLwvOU 1&LU jNòWLq]`V y]È]\ÿ]ÿ]sæV"

""A kÿ]Wp]Rs y^{~3/4}O`¥ 1&LU jNòWLq]pORa oqeLjÍqU
അവകാശ 2 oOfð 8 vRq jNòVWLqV xrLNkWLqU nLY]
R\ÿaOÕLjOU f}_ÿRÕaO^{3/4}]p]q]`OÐO."

""A kÿ]Wp]Rs y^{~3/4}O`¥ fj]`Lvw|o]RsæÐO SflÐOÐ fðfeU B
vW y^{~3/4}O`¥ 1&LU jNòWLq] 2 oOfð 8 vRq jNòVWLj`V
v}f]\ÿO fqOÐfLReÐV yÚf]\ÿ]q]`OÐO."

Section 5 of the Transfer of Property Act defines transfer of property as an act by which a person conveys property, in present or in future, to one or more other persons, or to himself or to himself and one more other persons. Section 10 of the Transfer of Property Act provides that where property is transferred subject to a condition or limitation absolutely restraining the transferee from parting with or disposing of his

interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. It is settled that in the case of co-ownership properties, partition involves severance of interest between persons who had pre-existing rights. Before partition, each co-owner will be having interest in every inch of the properties along with every other co-owner. By partition, the co-owner gets specific items exclusively for himself in lieu of the joint interest he had along with others in all the properties. The consideration for the partition is the renouncement of rights by the co-owners in all other common properties in favour of others. The partition is thus only an adjustment of rights between persons who had pre-existing rights over the properties. What is involved in the partition, therefore, is only mutual renunciation of rights and not transfer. As such, Section 10 of the Transfer of Property Act will not as such apply in the case of partition. But, it is trite that mere fact that partition does not involve transfer does not mean that any condition or limitation absolutely restraining the sharers in a

partition deed from parting with or disposing of their rights in the properties will be valid. Even though Section 10 of the Transfer of Property Act as such may not apply to partitions, the principle underlined in the said section is applicable in the case of partition also. True, the issue whether the principle underlying Section 10 of the Act is applicable or not depends on the nature of the estate obtained. If what is obtained under the partition is absolute ownership, power of alienation must go along with it and any restraint of that power will be against the public policy and will be deemed void. [See **Jagannathpuri Guru Kalameshwarpuri v. Godabai w/o.Kamaleshwarpuri and another** (AIR 1968 Bombay 25), **T.V.Sangam Ltd. v. Shanmughasundaram** (AIR 1939 Madras 769), **Mudara v. Muthu Hengsu** (AIR 1935 Madras 33), **Damodar v. Ramkrishna** (AIR 1925 Madras 624), **P.V.S. Vencatachellum v. P.V.S. Kabalamurthy Pillai** (AIR 1955 Madras 350) and **Krishnan Kumaran v. Mathew J.Mattom** (1957 KLT 407)].

7. With the aforesaid principles in mind, I shall proceed to examine the nature of the estate obtained by the first

defendant as per Ext.A1 partition deed. It is stated in Ext.A1 partition deed that the plaint schedule properties are the co-ownership properties of the first defendant and her children and for the convenient enjoyment of the said properties, the same needs to be partitioned to enable the co-owners to hold the property with all rights of alienation. The relevant portion of Ext.A1 partition deed reads thus:

“fLRu kŸ]WWt]œ v]vq]\ŸfOoLp KŸO y~³/₄O“tOU
CqOvi“OU WPŸOaoWtORa j]sp]œ jÚŸ RRRWvwU
v\ŸOU WpVvwWOa]pLÓLSqLaO vLqU kOrÕLaOWŸ
vyPœ R\pÅOU vĐfLp]qOĐ vñO“Ÿ WPŸOaoWtORa j]sp]
œ jÚŸ WpvwU Rv\ŸOU vLqU kOrÕLaOWŸ vyPœ
R\pÅOU vqOĐOR°Ė]sOU A°]RjpOç ^Ó] mLÈ|fWRt
yUmĪ]\Ÿ CqOvi“OU ARj|Lj|vOU kqy×qvOU pLRfLqO
Ia±sOWŸ“OU vĐ]Ÿ]sæRosLœ“Ls k]q]vOWŸ IaO“OĐf]
Rj yUmĪ]\ŸO jÚŸ ARj|Lj|U Ia\ŸsOWŸ vĐO S\qLç
CapOçfORWL°OU AfNfLh] BUYQzM]NhU vĐO
S\jĐOU vñO“Ÿ jw]\ŸO RkLWODfLReĐO jÚŸ“V SmLÈ|
RÕŸf]sOU A°]Rj vĐO R\qOĐ v]k³/₄]œ j]ĐO qfRÕaLç
Rv°] j]pov]SijpOU xrL NkWLqvOU KLSqL Rki“OU W]
ŸLjvWLwRÕŸ òLvqy~³/₄O“!Ÿ ARj|Lj|vOU kqy×qvOU

Dç A_jÀ mİU v]aO^{3/4}] NWpv]NWp y~Lfı|LvWLwoLp]
nLY]ÿO Rvıf]q]R\ÿaOÖLç f}ıÿRÖaO^{3/4}]p]q]~OĐO .”

A perusal of the aforesaid recitals in Ext.A1 partition deed indicates beyond doubt that what is obtained by the first defendant as per the terms of Ext.A1 is absolute ownership of the plaint schedule properties. It is beyond dispute that as per the terms of Ext.A1 partition deed, the first defendant was restrained from alienating the properties allotted to her share. The said restriction can, therefore, be regarded only as void. If the restriction imposed as per the terms of Ext.A1 partition deed on the first defendant to alienate the plaint schedule properties is regarded as void, as rightly held by the court below, Kunhammed did not acquire any right in the properties. If Kunhammed had not acquired any right in the properties, the plaintiffs cannot claim any right over the same.

8. **Ammukutty Amma v. Viswantha Iyer** (supra) was not a case where absolute ownership was conferred. That is a case where a lease was created in respect of a property by a person who had only a life interest in the property. The said

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decision, in the circumstances, has no application to the facts of the present case.

In the aforesaid facts and circumstances, there is no merit in this appeal and it is, accordingly, dismissed.

**Sd/-
P.B.SURESH KUMAR,
(JUDGE)**

kvs.

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PA TO JUDGE.