

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 3RD DAY OF JUNE 2015/13TH JYAISHTA, 1937

RSA.No. 76 of 2004 ()

AS 136/1997 of DISTRICT COURT,KASARAGOD.
OS 247/1996 of PRL.MUNSIFF, KASARAGOD.

APPELLANT(S)/APPELLANTS/PLAINTIFFS:

1. DINESH KUMAR, AGED 29 YEARS,
S/O. LEXMINARAYANA, HINDUS, CULTIVATORS,
RESIDING AT GIRIJA NILAYA COMPOUND,
NEAR KORAKODU MARIGUDI TEMPLE,
TALANGARA VILLAGE, P.O. KASARAGOD,
KASARAGOD TALUK AND DISTRICT
2. SRIKANTH, AGED 23 YEARS,
S/O. LAXMINARAYANA, HINDU, CULTIVATORS,
RESIDING AT GIRIJA NILAYA COMPOUND,
NEAR KORAKODU MARIGUDI TEMPLE,
TALANGARA VILLAGE, P.O. KASARAGOD,
KASARAGOD TALUK AND DISTRICT.

BY ADV. SRI.L.GOPALAKRISHNAN POTTI

RESPONDENT(S)/RESPONDENTS/DEFENDANTS:

1. LAXMINARAYANA, AGD 56 YEARS,
S/O. C.H.VINAYAKA, HINDU, HEAD CONSTABLE,
DISTRICT SUPERINTENDENT, BRANCH OFFICE,
MANGALORE-1,
DAKSHINA KANNADA, KARNATAKA STATE.
2. SMT.UMAVATHI, AGED 51 YEARS,
W/O. HARISARAN, HOUSEHOLD WORK, RESIDING AT
HARISANAN COMPOUND, GORIGUDDE, VELENCIA,
MANGALORE-2, DAKSHINA KANNADA DISTRICT,
KARNATAKA STATE.
3. SMT.VILASINI, AGED 41 YEARS,
W/O. K.RAVEENDRA, HINDU, HOUSE WIFE,
RESIDING AT B.15, POLICE QUARTERS, SAKTHI NAGAR,
MANGALORE-16, DAKSHINA KANNADA, KARNATAKA STATE.

R2 BY ADV. SRI.D.KRISHNA PRASAD
R2 BY ADV. SRI.D.NARENDRANATH
R2 BY ADV. SRI.M.HARISHARMA
R3 BY ADV. SRI.K.RAMACHANDRAN
R3 BY ADV. SMT.M.C.BINDUMOL

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY
HEARD ON 03-06-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. No. 76 of 2004
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Dated this the 3rd day of June, 2015.

JUDGMENT

This appeal arises out of a preliminary decree for partition in O.S. 247 of 1996 before the Munsiff's Court, Kasargod which was confirmed in appeal by the District Court in A.S. No. 136 of 1997 by judgment and decree dated 17.7.2003.

2. It is not in dispute that the suit property having an extent of 61 cents originally belonged to Ramappa, the great grandfather of the plaintiffs and grandfather of the defendants. He had two sons, namely, Vinayaka and Dasappayya. It is claimed that the first defendant got the right of Dasappayya over plaint A schedule property from his successors-in-interest. The claim was that the remaining half share devolved on the plaintiffs and defendants. It is averred in the plaint that the parties are governed by Mithakshara Law and since the property was ancestral property, the

plaintiffs by birth are entitled to have shares. Putting up such an allegation, they sought for partition of the property and claimed 2/18 shares.

3. The claim was resisted by defendants 2 and 3 and they pointed out that they had filed a suit for partition as O.S.179 of 1986 and a compromise was entered into between the father of the plaintiffs and first defendant by which six cents each was allotted to the defendants though the defendants are entitled to $1/3^{\text{rd}}$ share each. It was also contended that the suit was engineered by the first defendant to get more property in his favour.

4. The trial court raised necessary issues for consideration. The evidence consists of the testimony of P.W.1 and documents marked as Exts.A1 to A5 from the side of the plaintiffs. The defendants did not adduce any evidence.

5. The court below accepted the plea of the plaintiffs and granted 2/10 shares together. A

preliminary decree was passed in the following terms:

"1. that plaint A schedule property shall be divisible into 10 equal shares and 2 shares shall jointly to be allotted to the plaintiffs.

2. that 1st defendant is entitled to get allotment of 6 share on payment of court fee.

3. that 2nd and 3rd defendants are entitled to get allotment of 1 share each on payment of Court fee.

4. that plaintiffs is entitled to realise the cost of the suit from the 1st defendant and the cost of the suit shall come out of the estate.

5. that the quantum of profit to be realised by the plaintiffs is left open for determination at the time of final decree proceeding.

6. that first defendant is liable for the profit to be payable to the plaintiffs."

6. The plaintiffs took up the matter in appeal and they sought for amendment of the plaint

incorporating a plea that each of the plaintiffs is entitled to 2/18 shares and they wanted to have the mistake corrected. That was the main issue urged before the lower appellate court. The court below considered whether the allotment of the property as per the decree impugned before the said court was justified or not. The lower appellate court found no justification in the claim put forward by the plaintiffs at the appellate stage seeking amendment of the plaint.

7. It is not in dispute that the plaintiffs claimed the property as ancestral property and they claim right by birth. The lower appellate court has doubts about the earlier decree passed. However, it did not go further with regard to that decree and found that even though there may be several issues that could be thrown up for consideration, they were not considered by the Munsiff's Court. The lower appellate court found that equitable distribution made by the Munsiff's

Court does not call for any interference.

8. The lower appellate court also pointed out that the case now presented by the plaintiffs was that they may be entitled to more shares, but considering the earlier suit and also the compromise entered into by the parties and also the present claim, the lower appellate court too felt that there was no justification in interfering with the decree of the lower appellate court.

9. Notice was issued on the following substantial questions of law:

(1) In the facts and circumstances of the case, are the lower courts justified in negating the claim for four upon eighteen shares.

(2) In the facts and circumstances of this case, what is the share to which the plaintiffs are entitled to?

10. Learned counsel appearing for the appellants contended that the lower appellate court ought to have allowed the amendment application and

modified the shares accordingly.

11. The lower appellate court found that though Ext.A6 was produced at the appellate stage, that could not be considered in isolation and also found that the amendment application moved by the plaintiffs claiming more shares deserves consideration. The lower appellate court was also justified in its conclusion that a fresh decision based on Ext.A6 could not be granted. One would also notice that the amendment brought in may have considerable impact on the issue involved in the suit. One may here recall that the lower appellate court itself was skeptical about its decree though on a compromise.

12. Both the courts below came to the conclusion that the present suit has been engineered by the first defendant who after entering into the compromise in the earlier suit had now approached the trial court to defeat the legitimate owners.

13. On going through the evidence and also various other matters which had not been strictly considered by the court below, it appears that no purpose will be served by allowing the application and sending the matter for trial which will complicate the matter further and it does not appear that the plaintiffs will stand to gain in view of Joint Hindu Family System (Abolition) Act of 1975 and the amended Section 6 of Indian Succession Act.

In the light of the above facts, this Court finds that the view taken by the lower courts need not be interfered with in the light of what has been stated above. This appeal is without merits and it is accordingly dismissed.

sb.

P. BHAVADASAN,
JUDGE