

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 29TH FEBRUARY 2008 / 10TH PHALGUNA 1929

SA.No. 630 of 1995(G)

A.S. NO.27/1989 OF SUB COURT, TIRUR.
O.S. MO.48/85 OF MUNSIFF COURT, PARAPPANANGADI

APPELLANTS/(APPELLANTS IN THE LOWER APPELLATE COURT- DEFENDANT
----- 2 AND 3 BEFORE THE TRIAL COURT)

1. EDAPPARUTHI KOYILIPURATH VELAYUDHAN,
S/O. GANAPATHI, RESIDING AT CHELEMBRA AMSOM,
AND DESOM IN ERNAD TALUK. (DIED).

IT IS RECORDED THAT 1ST APPELLANT DIED AS PER ORDER DT.18.7.96 IN
MEMO C.F.1855/1996.

2. PARUTHIKKADAN BALAN, S/O. VELAYUDHA, DO. DO.

SUPPL. 3RD APPELLANT IMPEADED.

SUPPL. 3RD APPELLANT. EDAPPARUTH KOYLIPURATH MADAHVI,
W/O. VELAYUDHAN, RESIDING AT
CHELAMBRA AMSOM AND DESOM,
ERNAD TALUK. (DIED LRS. RECORDED)

IT IS RECORDED THAT THE 3RD APPELLANT DIED AS PER ORDER DT.
25.02.2003 IN MEMO C.F.268/2000 DT. 18.1.2000.

THE LEGAL REPRESENTATIVE OF DECEASED IST APPELLANT IS
IMPEADED AS SUPPLEMENTAL 3RD APPELLANT AS PER ORDER
DT. 25.2.03 IN CMP. 316/97 AND IT IS RECORDED THAT IST RESPONDENT
AND 2ND APPELLANT ARE THE LEGAL REPRESENTATIVES OF DECEASED
SUPPLEMENTAL 3RD APPELLANT AS PER ORDER DT. 25.2.03 IN CMPS 999/2000
& CMP. 229/2000 RESPECTIVELY.

BY ADV. SRI.T.KRISHNANUNNI

RESPONDENTS: (RESPONDENTS IN THE LOWER APPELLATE COURT- PLAINTIFF
----- AND DEFENDANTS 1 AND 4 IN THE TRIAL COURT)

1. PUZHAKKAL KARTHIAYANI,
D/O. EDAPPARUTHI KOYILIPPURATH,
GANAPATHI.

S.A. NO.630/1995

2. EDAPPARUTHI KOYILIPPURATH SREEDHARAN
S/O. KRISHNAN.
3. KUZHIMANNA EDAPPARUTHI BALAKRISHNAN,
S/O. VELAYUDHAN.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.) - R1
SRI.KODOTH PUSHPARAJAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 29/02/2008 , THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

JUDGMENT

Appellants called. Absent. No representation.

Appeal dismissed for default.

29/02/2008

SD/- M.SASIDHARAN NAMBIAR, JUDGE

ORDER ON CMP. NO.296/1999 IN SA. NO.630/1995

DISMISSED

29/02/2008

SD/- M.SASIDHARAN NAMBIAR, JUDGE

/TRUE COPY/

P.S. TO JUDGE

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P.B.SURESH KUMAR, J.

Second Appeal No.630 of 1995

Dated 23rd November, 2015.

J U D G M E N T

Defendants 2 and 3 in a suit for partition are the appellants.

2. The suit property was an acquisition made by one Ganapathy. Ganapathy had three children, viz., the plaintiff, second defendant and one Sekharan. The parties were governed by Hindu Mithakshara Law. According to the plaintiff, Ganapathy died after the coming into force of the Hindu Succession Act; that her brother Sekharan was not known for the last several years and that therefore, she is entitled to half share in the property. The second defendant contested the suit. According to him, Ganapathy died before the coming into force of the Hindu Succession Act and as such, the suit property devolved on him and Sekharan on the death of Ganapathy. The trial court found that Ganapathy died prior to the Hindu

Succession Act and since the parties were governed by Hindu Mithakshara Law, the suit property devolved on the second defendant and Sekharan on the death of Ganapathy. However, the trial court took the view that since Sekharan was not heard of for more than seven years, it has to be presumed that he is no more and therefore, the plaintiff is entitled to the half share of Sekharan in the suit property. Though the trial court held that the plaintiff is entitled to only the half share of Sekharan, the court declared that the plaintiff is entitled to half share in the property. Defendants 2 and 3 took up the matter in appeal. The appellate court clarified that the plaintiff is entitled to only one fourth share in the suit property. The preliminary decree passed by the trial court was accordingly modified. Defendants 2 and 3 who are aggrieved by the decision of the trial court, as modified by the appellate court, have thus come up in this second appeal.

3. Heard the learned Senior counsel for the appellants as also the learned Senior counsel for the first respondent, the plaintiff.

4. The learned Senior Counsel for the appellants contended that in the matter of arriving at the conclusion that the plaintiff is entitled to one fourth share in the suit property, the courts below proceeded on the basis that Sekharan died after the coming into force of the Hindu Succession Act. According to the learned Senior Counsel, there is nothing on record to indicate that Sekharan died after the coming into force of the Hindu Succession Act. It was also pointed out by the learned Senior Counsel that since Sekharan was not heard of for more than seven years, it can only be presumed that he is no more and in the absence of any presumption as to the date of death, it was the duty of the plaintiff to prove that Sekharan died after the coming into force of the Hindu Succession Act. It was also contended by the learned Senior Counsel that in the absence of any evidence to show that Sekharan died after the commencement of the Hindu Succession Act, the plaintiff is not entitled to any right in the property.

5. Per contra, the learned Senior Counsel for the first defendant contended that the materials on record are

sufficient to infer that Sekharan died after the commencement of the Hindu Succession Act. He relied on the pleadings of the parties to substantiate the said contention. According to the learned Senior Counsel for the first respondent, in so far as the death of Sekharan itself was presumed for the purpose of deciding the rights of parties over the suit property, the plaintiff can only rely on the facts and circumstances of the case to establish that Sekharan died after the coming into force of the Hindu Succession Act.

6. At the outset, it is seen that the contention raised by the learned counsel for the appellants in this second appeal is not a contention raised before the lower appellate court. It is now settled that a contention which has not been raised by a party before the lower appellate court cannot be raised for the first time in a second appeal filed invoking Section 100 of the Code of Civil Procedure.

7. Be that as it may, there is no dispute to the fact that the plaintiff is entitled to one fourth share in the suit property, if the death of Sekharan had taken place after the

commencement of the Hindu Succession Act is not disputed by the appellants. As such, the only issue to be considered is whether the plaintiff has established that the death of Sekharan had taken place after the coming into force of the Hindu Succession Act. In the plaint, what was stated by the plaintiff concerning Sekharan was that he left the place several years ago and that he is not heard of by anybody. It is also stated that since Sekharan was not heard of beyond seven years, it shall be presumed that he is no more. The relevant portion of the pleadings in the plaint read thus :

“ശേഖരൻ എന്നവർ വളരെ കൊല്ലങ്ങൾക്കു മുമ്പ് നാടുവിട്ടു പോയിരിക്കുന്നതും ടിയാനെ കണ്ടവരും കേട്ടവരുമായി ആരും തന്നെ ഇല്ല. കഴിഞ്ഞ ഏഴു കൊല്ലത്തിനെയോ മുമ്പേ ടിയാനെപ്പറ്റി യാതൊരു വിവരവും ഇല്ലാത്തതിനാൽ ടിയാൻ മരിച്ചതായി നി യമപ്രകാരം കണക്കാക്കേണ്ടതുമാണ്.”

The reply given by the second defendant in the written statement filed by him to the aforesaid averment in the plaint was that the plaintiff is not entitled to any right as a successor of Sekharan. The relevant portion of the written statement of

the second defendant reads thus :

“ശേഖരൻ എന്നയാളുടെ അവകാശവും അന്യായക്കാർക്ക് സിദ്ധി
കുന്നതല്ല.”

Subsequently, the plaint was amended. In the amended plaint, it was further stated by the plaintiff that Sekharan was not heard of for the last more than 20 years. The relevant portion of the amended plaint reads thus :

“കഴിഞ്ഞ ഇരുപതു കൊല്ലത്തിനു മീതെയായി ശേഖരൻ
എന്നവർ നാട്ടിൽ വരാറില്ല. ടിയാനെ കണ്ടവരോ ടിയാനെപ്പറ്റി
കേട്ടവരോ ആരുമില്ല.”

Though an additional written statement was filed by the second defendant to the amended plaint, the aforesaid averment in the amended plaint has not been dealt with by the second defendant in the additional written statement. As rightly contended by the learned Senior Counsel for the second defendant, there is no presumption as to the date of death and the date of death, if disputed, has to be proved by the person who is bound to prove the said fact. As such, in so far as the plaintiff is claiming a share in the suit property on the basis

that Sekharan died after the commencement of the Hindu Succession Act, it is for the plaintiff to establish the said fact. As rightly contended by the learned Senior Counsel for the plaintiff, where the death itself is presumed in a given case, one cannot be expected to prove the date of death by positive evidence. In such cases, according to me, issues relating to death can only be found applying the principles of preponderance of probability. As far as the present case is concerned, it is not necessary for the plaintiff to establish the date of death of Sekharan. The plaintiff need only establish that Sekharan died after the coming into force of the Hindu Succession Act. As noticed above, the plaintiff has stated in the unamended plaint that Sekharan was not heard of for the last so many years. Later, in the amended plaint, the plaintiff clarified that Sekharan was not heard of for the last more than 20 years. There cannot be any dispute to the fact that the right claimed by the plaintiff over the suit property is dependent on the fact as to whether death of Sekharan took place before or after the commencement of the Hindu

Succession Act. It cannot be presumed that the second defendant was not aware of the said fact. The second defendant has not stated either in the original written statement filed by him in the suit or in the additional written statement filed by him to the amended plaint that the death of Sekharan took place before the commencement of the Hindu Succession Act. True, the averment in the amended plaint is only to the effect that Sekharan was not heard of for more than 20 years. The said averment, in the circumstances, cannot be understood as a statement that Sekharan was heard of before 20 years. Nevertheless, the said averment gives an indication that Sekharan was not heard of only for the last 20 years prior to the institution of the suit. The suit was of the year 1985. In the said circumstances, in the absence of any reply to the averment made in the amended plaint concerning the death of Sekharan, it is only reasonable to infer that Sekharan died after the commencement of the Hindu Succession Act as the possibility of his death between 1956 and 1965, cannot be ruled out. In the said view of the matter, there is no illegality in

the decisions of the courts below.

In the result, there is no merit in this second appeal and the same is, accordingly dismissed. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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