

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 28TH DAY OF JULY 2015/6TH SRAVANA, 1937

RFA.No. 364 of 2008 ()

O.S. 51/1990 PRINCIPAL SUB COURT, KOLLAM

APPELLANT IN R.F.A.- DEFANDANT NO.23 IN SUIT :

K.G.THOMAS, S/O K.GEORGE, KAYALVARATHU,
PUTHEN VEEDU, PANAYAM P.O., PANAYAM CHERRY,
KOLLAM DISTRICT.

BY ADVS.SRI.K.JAYAKUMAR (SR.)
SRI.P.B.KRISHNAN
SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON
SMT.V.DEEPA

RESPONDENTS IN R.F.A. PLAINTIFF & DEFENDANTS 1 TO5, 7 TO 20 ADDL.
DEFENDANTS 21,22 & 24 TO 27 IN SUIT :

1. KOCHUKUNJU OMMACHAN @ K. OMMAN,
KAYALVARATHU PUTEN VEEDU, PANAYAM PERINADU P.O.,
QUILON, KERALA.
2. THE STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM.
3. DIRECTOR OF PUBLIC INSTRUCTIONS,
THIRUVANANTHAPURAM -14.
4. ASST. EDUCATIONAL OFFICER, QUILON.
5. K.A. ALEXANDER, KAYALVARATHU PUTHEN
VEEDU, PANAYAM, PERINAD, QUILON.
6. K.GEORGE, IN DO. DO.
- *7. REV. K. THOMAS, EBENEZAR MARTHOMA
CHURCH, GANGAMA CIRCLE, JALLAHALLI,
BANGLORE 560 013. (DIED)
- *8. ELIZABETH CHERIAN, D/O KOCHU KUNJU,
EDAYILAVEEDU, KUMBAM POIKA BHAGATHU,
PERUMPUZHA CHERRY, KOTTANKARA VILLAGE.(DIED)

- 9. K.LUTHIYAMMA, D/O KOCHUKUNJU,
PANDAKASALA PUTHEN VEEDU, KUMBAMKODU WARD, AYOOR.**
- 10. K.ANNAMMA, KARUMANKOTTU PUTEN VEEDU,
EDAMULAKKAL VILLAGE, VAYAKKAL P.O.**
- 11. SOSAMMA, K. MALAYIL PLAMOOTTIL VEEDU,
KADAMPANATTU VADAKKU, KUNNATHOOR TALUK**
- 12. K. MARY KUTTY, PERUMATHU MADAM,
KAIVILA P.O., PUTHEN SANGETHAM, THEVALAKKARA.**
- 13. KUNJAMMA JOHN, W/O YOHANNAN @ K. JOHN,
KAYALVARATHU PUTHEN VEEDU, PANAYAM, PERINADU.**
- 14. K.J. ABRAHAM, S/O. DO. KRIPA BHAVANAM,
PANAYAM, PERINADU.**
- 15. K.J. MARIYAMMA, D/O K.YOHANNAN ,
THOTTATHIL VEEDU, KOZHIKODE, KATTADY
JUNCTION, POYAPPALLY.**
- 16. K.J. MATHUKUTTY, S/O YOHANNAN,
KAYALVARATHU PUTHEN VEEDU, PERINAD, NOW
RESIDING AT T.C 4/1187, KORAVANKONAM MARKET, ROAD
KOWDIYAR P.O., THIRUVANANTHAPURAM.**
- 17. J. SWANNAMMA, S/O. YOHANNAN, THANIKKALPURATHU,
KUMPALAMPOIKA, PATHANAMTHITTA, NOW RESIDING AT
B1-T2, ZURI COMPLEX, BAINA, VASCO GOA.**
- 18. K.J. ALEXANDER, S/O. YOHANNAN,
KAYALVARATHU PUTHEN VEEDU, PANAYAM NORTH, PERINAD
NOW AT P.B. NO. 795, AL KHAFJI-31971, K.S.A**
- 19. K.J.PHILIP, S/O K. YOHANNAN, KAYALVARATHU
PUTHEN VEEDU, PANAYAM NORTH, PERINAD
NOW, AT C/O GEORGE MANUEL 4400, WICKHAM AVE
APARTMENT 4-B, BRONEX, NEWYORK 10466
1257, USA.**
- 20. SAJAN, S/O OMMACHAN, KAYALVARATHU PUTHEN
VEEDU, PANAYAM NORTH, PERINAD.**
- 21. K.G. MARIYAMMA, D/O.K. GEORGE, PARAVOOR
CHERRY, NANTHANKODE, THIRUVANANTHAPURAM DIST.**
- 22. G.ALIYAMMA, E/O JACOB, KODIYIL PUTHEN
VEEDU, P.O. POYAPPALLY, KOLLAM.**
- 23. MARIYAMMA, KARUVELIL PEEDIKAYIL VEEDU,
MADAKKAVU, CHENGANNOOR.**

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- 24. LEELAMMA, D/O K.ALEXANDER, (RETIRED PROFESSOR)
THANNIKKAPURATHU, KUTTUPUZHA P.O., THIRUVALLA -3.**
- 25. SUSANNAMMA, D/O ALEXANDER,(RETD.HEADMISTRESS)
KUMBUKADU, KIZHAKKATHIL, VALAKOM, KOTTARAKKARA**
- 26. SAM ALEXANDER (DY. MANAGER, SBT)
S/O K. ALEXANDER, KAYALVARATHU , PERINADU, KOLLAM**

***THE LEGALHEIRS OF DECEASED R7 & R8 NEED NOT IMPEADED VIDE
ORDER DATED 19/6/2014 IN IA'S 1665, 1666/13 CMA 399/13 AND IA'S 1667,
1668/13 AND CMA 400/13.**

**R1 BY ADV. SRI.C.UNNIKRISHNAN (KOLLAM)
R2,R3 & R4 BY GOVERNMENT PLEADER SRI. EGGY N ELIAS
R9,11,20 BY ADV. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
R9,11,20 BY ADV. SRI.A.R.DILEEP**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 22-07-2015, ALONG WITH RFA. 392/2008, RFA. 123/2009,THE
COURT ON 28/07/2015 DELIVERED THE FOLLOWING:**

bp

P.B.SURESH KUMAR, J.

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**R.F.A.Nos.364 of 2008, 392 of 2008
& 123 of 2009**

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Dated this the 28th day of July, 2015.

J U D G M E N T

These appeals are preferred against the decree and judgment in O.S.No.51 of 1990 on the file of the Sub Court, Kollam. The suit was one for settlement of a scheme for the management of an aided school and for removal of its manager. Additional defendant No.14 in the suit is the appellant in R.F.A.No.392 of 2008, additional defendant No.23 is the appellant in R.F.A.No.364 of 2008 and additional defendant No.27 in the suit is the appellant in R.F.A.No.123 of 2009.

2. The facts relevant for decision of the appeals are the following: The plaint schedule property belonged to one Idichandy Kochukunju. He founded an upper primary school, hereinafter referred to as 'the school' for short, in the said property and was managing the same till his death. On the death of Idichandy Kochukunju, hereinafter referred

to as 'the founder', for short, his male children, namely plaintiff and defendants 4 to 7 had executed an udambady on 10.6.1959 and as per the terms of the said udambady, the seventh defendant was appointed as the Manager of the school and he was managing the school thereafter. On 9.9.1989, the seventh defendant resigned the managership. Thereupon, without the junction of the plaintiff, defendants 5 to 7 appointed the fourth defendant as the Manager of the school. The suit was filed at that point of time praying, among others, for a decree for settlement of a scheme for the management of the school and for removal of the fourth defendant from the management of the school.

3. Defendants 4 to 7 contested the suit, contending, inter alia, that there is no necessity to frame a scheme for the management of the school and that the fourth defendant does not have any disqualification to hold the office of the Manager of the school. While the matter was pending before the trial court, the female children of the founder got themselves impleaded in the suit as defendants

8 to 12. Among them, defendants 8, 9 and 11 filed written statements contending, among others, that the female children of the founder are also entitled to equal right in the plaint schedule property as also in the management of the school. Eleventh defendant had also raised a counter claim for a declaration that she is entitled to 1/10 right in the plaint schedule property.

4. In the light of the written statement filed by the female children of founder, some of the male children filed additional written statements contending that in the light of their exclusive possession of the property from 10.6.1959 pursuant to the execution of the Udambady, they have perfected their title to the plaint schedule property by adverse possession and ouster.

5. Defendants 4 to 6 died pending suit. Additional defendants 13 to 19 are the legal representatives of the deceased sixth defendant, additional defendants 21 to 23 are the legal representatives of the deceased fifth defendant and additional defendants 24 to 27 are the legal

representatives of the deceased fourth defendant. Defendant No.20 is the transferee of the rights of eighth defendant in the suit property.

6. The evidence in the case consists of the oral testimony of PW1 and Exts.A1 to A17 on the side of the plaintiff and the oral testimony of DW1 to DW6 and Exts.B1 to B41 on the side of the defendants.

7. Though the trial court found that the female children of the founder have no right in the plaint schedule property, decreed the suit, directing framing of a scheme for the management of the school. The prayer for removal of the fourth defendant from the management of the school was however turned down. In the light of the finding that the female children of the founder do not have any right in the property, the counter claim preferred by the eleventh defendant was dismissed.

8. Defendants 8, 9 and 11 challenged the decision of the trial court before this Court in A.S.No.413 of 2000. This Court, on a reappraisal of the materials on record, found

that the finding of the trial court that the female children of the founder have no rights in the property is incorrect and unsustainable. However, this Court took the view that since there is no satisfactory evidence to decide the plea of adverse possession and ouster, the suit has to be remitted to the trial court to decide the said issue, after affording the parties an opportunity to adduce further evidence. Accordingly, the judgment impugned in the appeal was set aside and the suit was remitted to the trial court.

9. Thereupon, five more witnesses were examined on the side of the defendants as Dws.2 to 6. The additional documents produced by the defendants were also admitted in evidence as Exts.B30 to B41. Thereafter, on an elaborate consideration of the entire materials on record, the trial court came to the conclusion that the female children of the founder have not lost their rights over the suit property by adverse possession and ouster and that all the children have 1/10 right over the plaint schedule property. The court also held that the female children of the founder also have the

right to participate in the management of the school. Consequently, the suit and the counter claim were decreed, directing framing of a scheme for the management of the school with the participation of both the male and female children of the founder. Additional defendants 14 and 23 are aggrieved by the said decision of the trial court and hence these appeals.

10. Heard the learned counsel on either side.

11. In the light of the decision of this Court in A.S.No.413 of 2000, the only issue that falls for consideration in these appeals is whether the male children of the founder have perfected title to the plaint schedule property by adverse possession and ouster. In order to establish adverse possession by one co-owner as against another, ouster of the non-possessing co-owner by the co-owner in possession should be made out. The possession of one co-owner is considered, in law, as possession of all the co-owners. The co-owner in possession cannot render his possession adverse to the other co-owner not in possession

merely by any secret hostile animus on his own part in derogation of the other co-owner's title. As between co-owners, there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other to constitute ouster. In **Annakutty v. Xavier** (1991(1) KLT 342), this Court held that a positive overt act constituting ouster has to be proved by the co-owner, who claims prescriptive title and exclusive possession. The fact that intestate succession of Christians in the erstwhile Travancore area, after the promulgation of Part B States (Laws) Act, 1951 is governed by Chapter II of Part V of the Indian Succession Act and therefore, the children of Christian parents in that area have equal rights over the estate left by their parents, cannot be disputed. The contention raised by the male children of the founder as against the female children is that on the death of the founder, his male children had executed Ext.A4 udambadi and continued to manage the school openly, continuously and uninterruptedly with the

knowledge of the female children from 10.6.1959 onwards and therefore, from the date of Ext.A4 udambadi, the female children must be deemed to have been ousted from the suit property. A perusal of Ext.A4 udambadi reveals that the same is only a document executed and registered for the administration of the school. The said document does not deal with the rights over the plaint schedule property. Thus, the evidence tendered by the fourth defendant as DW1 and the seventh defendant as DW2 indicates that though the female children of the founder were not parties to Ext.A4 udambadi, they were consulted in the matter of administering the affairs of the school. As such, it can be safely presumed that the female children of the founder might not have been included in Ext.A4 udambadi as they were all married and settled at distant places and it was not convenient for them to take part in the day-to-day affairs of the school. If they were also consulted in the matter of administering the affairs of the school, the contention that the female children of the founder were excluded from the

administration of the school cannot be accepted. It is common knowledge that the members of the Christian community in the erstwhile Travancore area were all along under the impression that the female children will not have any right in the properties left behind by their parents and it is only when the Apex Court declared the law in **Mary Roy & others v. State of Kerala and others** (1986 KLT 508 (SC)), the people became aware of the rights of the female children. As such, even assuming that the female children of the founder were excluded completely by the male children in the matter of enjoying the plaint schedule property and administering the affairs of the school, the same can only be without there being any intention to exclude the female children. As such, it cannot be contended, at any rate, that the male children of the founder were possessing the plaint schedule property and administering the affairs of the school adverse to the interest of the female children. Further, the male children of the founder have also not proved any positive overt act

constituting ouster of the female children from the suit property. In that view of the matter, the decision of the court below holding that the male children have not established title to plaint schedule property by adverse possession and ouster, cannot be held to be incorrect. The appeals are devoid of merits and the same are, accordingly, dismissed.

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

Kvs/-

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PA TO JUDGE.