

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

RFA.No. 425 of 2012 ()

**(THE JUDGMENT AND DECREE IN OS.NO. 889/2008 OF PRINCIPAL SUB COURT,
IRINJALAKUDA DATED 31-03-2011)**

APPELLANT/1ST DEFENDANT :

**JOY, AGED 65,
SON OF MAMBRAKARAN KOCHUDEVASSY,
MAMBRAKARAN HOUSE MOONNUMURI, MATTATHUR P.O.,
MUKUNDAPURAM TALUK.**

**BY ADVS.SRI.S.EASWARAN
SRI.P.MURALEEDHARAN (IRIMPANAM)
SRI.M.A.AUGUSTINE**

RESPONDENT(S)/PLAINTIFFS :

- 1. THOMAN, AGED 66 YEARS,
S/O.POULOSE, AZHCHANGADAN HOUSE, NO.24/7,
BASHAN REDDY THERUV, OTTERI, MADRAS-12.**
- 2. ROSSY, AGED 69 YEARS, W/O.ITTOOP,
PAINADATH HOUSE, VATTAPARAMBU P.O.,
KARIPPASSERY, PARAKADAVU VILLAGE, ALUVA TALUK-683 579**
- 3. PREMA, AGED 59 YEARS,
MAMBRAKARAN KOCHUDEVASSY & W/O.MATHEW,
KALAPURAKKAL HOUSE, UPPUZH P.O.,
INCHAKUNDU VARNDARAPPILLY VILLAGE,
MUKUNDAPURAM TALUK-685 510.**
- 4. BABY, AGED 59 YEARS,
D/O.MAMBRAKARAN KOCHUDEVASSY & W/O.GEORGE,
NETTIKADAN HOUSE, MOONNUMURI P.O, MATTATUR,
MATTATHUR VILLAGE, MUKUNDAPURAM TALUK-695 615.**
- 5. SHEELA, AGED 57 YEARS,
D/O.MAMBRAKARAN KOCHUDEVASSY & W/O.K.L.GEORGE,
KANNAMMADATHI HOUSE, ANANDAPURAM P.O,
ANANDAPURAM VILLAGE, MUKUNDAPURAM TALUK-680 323.**

**R1 TO R5 BY SRI.RENJITH THAMPAN,SENIOR ADVOCATE
ADV. SRI.V.M.KRISHNAKUMAR**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 04-06-2015,THE COURT ON 10-06-2015 DELIVERED THE FOLLOWING:**

R.F.A.NO.425/2012

APPENDIX

PETITIONER'S ANNEXURES:

ANNEX A1 COPY OF THE DOCUMENT NO.1007 DATED 17/3/1966.

**ANNEX A2 COPY OF THE DEATH CERTIFICATE ISSUED BY THE DIOCESE OF
IRINJALAKUDA EVIDENCING THE DATE OF DEATH OF ROSA.**

RESPONDENT'S ANNEXURES: NIL

/TRUE COPY/

P.S.TO JUDGE

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**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

R.F.A. No. 425 OF 2012

Dated this the 10th day of June 2015

JUDGMENT

Sunil Thomas, J.

The first defendant in a suit for partition, O.S. No.889/2008 of the Sub Court, Irinjalakuda, aggrieved by the judgment and decree dated 31/3/2011, has preferred this appeal.

2. According to the plaintiffs, the plaint schedule property belonged to one Rosa, who was the predecessor of the plaintiffs. The plaint schedule property was acquired by her by document No.1482/1113 Nellayil S.R.O. She was married to one Lonappan, who had pre-deceased her. She died in the year 1969. She had six children by name Kochu Devasy, Kunjeliya, Kochu Rosa, Kunjannam, Augusthy and Kochappan. Augusthy

and Kochappan died issueless. The plaint B Schedule property belonged to Augusthy and Kochu Devasy jointly having acquired by document No.1153/117. Kochudevassy was mentally ill and committed suicide. At the time of death of Rosa in 1969, she had four children surviving. Thereafter, the plaint schedule properties devolved on the plaintiffs and the defendants. Hence, they sought for partition of the plaint schedule property by metes and bounds with mesne profit.

3. The first defendant alone contested the proceedings. He filed a detailed written statement denying the various plaint allegations. It was contended that the suit was factually and legally unsustainable and devoid of merits. Rosa never had a daughter by name Kunjannam. The contention that Kochudevassy had mental disorder and committed suicide were false. The contention that Kochudevassy died intestate was also false. Kochudevassy during his life time had executed a settlement deed No.3706/1976 of Nellayi SRO jointly with the first defendant. By the above document, his rights were assigned to the first defendant. As per the settlement deed, certain

amounts were to be paid to the legal heirs of Rosa which were paid and registered receipts executed by the first defendant. On the strength of the above settlement deed, the plaintiff schedule properties devolved on the first defendant on the death of the Kochudevassy and Mary. It were owned, possessed and managed by the first defendant as his own. The settlement deed had the effect of a partition under law governing the parties. The allegation that the plaintiffs have inherited the right on the property was incorrect. The plaintiffs accepted the settlement deed by receiving the payments mentioned in the deed and by executing registered receipt in favour of the first defendant. There was no person by name Kunjannam and hence she was not a successor of Rosa. The contention that Kunjannam had inherited $1/4^{\text{th}}$ share in plaintiff A schedule property which devolved on the plaintiffs 1 and 2 on the death of Rosa was incorrect. The claim that pursuant to the death of Augusthy, his one half share in plaintiff B schedule devolved upon Kunjannam and thereafter on the plaintiffs is incorrect. The contention that the plaintiffs 3,4 and 5 are also entitled to share in the plaintiff B

schedule property having inherited the share from father Kochudevassy and also as the legal heirs of deceased Augusthy was also not correct. The first defendant was in exclusive possession as the sole owner of the property and there was no co-ownership and joint possession. After obtaining the property, he had cultivated the land, made improvements, constructed a house therein and availed bank loan for agricultural purposes.

4. On the basis of the above pleadings, the court below formulated the issues for consideration and parties were called upon to adduce evidence. On the side of the plaintiffs, PWs1 to 3 were examined and Exts.A1 to A5 were marked. On the side of the defendants, first defendant was examined as DW1 and Exts.B1 to B5 were marked.

5. The court below after an evaluation of the available evidence refused to rely on Ext.B1 settlement deed and Exts.B3 to B5 receipts. The plaint schedule properties were ordered to be partitioned with reservation of equities and quantum of mense profits to be decided in the final decree proceedings.

6. Dissatisfied with the above judgment and decree, the first defendant has preferred this appeal. The point that arises for consideration is whether the preliminary decree passed by the court below is legally sustainable.

7. The point: It is an admitted fact that Rosa died intestate in the year 1969. Defendants 2 and 3 are presently the only surviving children of Rosa. It is also not in dispute that her husband had pre-deceased her. The parties to the suit and the relationship between the legal heirs are also not in dispute, except regarding Kunjannam. It is also admitted that Augusthy and Kochappan had died in issueless. It is also not in dispute that plaintiff A schedule belonged to Rosa and B schedule to Augusthy and Kochudevassy jointly.

8. Though the plaintiffs claimed was that Rosa had six children including a daughter by name Kunjannam, this was disputed by the first respondent. In the written statement, it was specifically pleaded that she had no daughter by name Kunjannam and such a person never existed. Kunjannam was claimed to be mother of the first and 2nd defendants. To prove the

existence of Kunjannam, PWs 1 to 3 gave evidence. PW2 is the son of the 3rd defendant and PW3 is the son of the second defendant. Further Ext.A4 death certificate by Kunjannam was let in evidence. Ext.A3 is the marriage certificate of the son of Kunjannam. The above materials coupled with the oral testimony of PWs 1 to 3 prove that Kunjannam was the daughter of Rosa. This contention, though seriously taken up before the court below, was not pursued by the learned counsel for the first defendant before us.

9. B schedule property was obtained by Kochu Devassy and Augusthy by Ext.A2 document. The first defendant claimed right over the entire plaint B schedule property on the strength of Ext.B1 settlement deed No.3706/1976 executed by Kochu Devassy. By Ext.B1, the one half share held by Kochudevassy was settled in favour of the first defendant. There were stipulations regarding payment of money to plaintiffs 3 to 5. According to the first defendant, on the strength of the above document, he had constructed a house, carried out improvements and had availed bank loan. The fact that the first defendant was

in possession of the property and effected improvements was not disputed.

10. The definite contention of the plaintiffs regarding Ext.B1 was that Kochu Devassy had not executed such a document and that during the relevant period, Kochu Devassy was mentally incapacitated. According to the plaintiffs, Kochu Devassy was suffering from unsoundness of mind at least for a period of ten years preceding his death and he committed suicide in 1979. The fact that Kochudevassy had committed suicide is evident from Ext.A5 death certificate, dated 8/8/1979. The version that Kochu Devassy was suffering from unsoundness of mind, is neither proved nor attempted to be proved by any evidence. Hence such a contention will not survive.

11. The court below had relied on a solitary portion of the testimony of DW1, seen at page 8, of the original deposition to disbelieve Ext.B1. DW1, in the course of oral testimony, had agreed with the suggestion that Ext.B1 will not affect the right of the plaintiffs over the property. Relying on the above piece of admission, the court below refused to accept Ext.B1. The above

finding of the court below is not factually sustainable for more reasons than one.

12. Firstly, the evidence of DW1 as a whole shows that he had been claiming exclusive possession and right over the property on the strength of Ext.B1 as against all others. He asserted that he had exclusive right on the basis of Ext.B1. Hence, he could not have voluntarily and knowingly admitted that Ext.B1 will not affect the right of the other legal heirs of Kochy Devassy. Secondly, the above admission was in reply to a suggestion put by the learned counsel for the plaintiff. The nature of the answer itself indicates that it appears to have been given in reply to either a complex question or one loaded with multiple suggestions that it was not correct to say that Ext.B1 will not bind the rights of the plaintiffs over the property covered by Ext.B1. Evidently, a complex question was put to him and an unintended admission obtained from him which was contrary to his entire case. Lastly, there cannot be an oral admission contrary to the contents of a document. Hence, the above version of DW1 relied on by the court below cannot be used

against DW1 as a categoric and unambiguous admission.

13. The court below has given one more reason for rejecting Ext.B1. According to the court below, none of the plaintiffs are parties to Ext.B1 and hence, it cannot be relied on. This is incorrect since Kochu Devassy had one half right over the property and he could have settled his right in favour of any person during his life time without the junction of others.

14. The learned counsel for the first defendant contended that the court below did not appreciate properly his contention regarding ouster. It was contended that the first defendant has been exercising right over the plaint schedule properties, as of right and his open assertion over the property was to the exclusion of other co-heirs. It was contended that the court below ought to have held that the plea of ouster was legally sustainable. To substantiate his contention, the learned counsel relied on the decisions reported in **Hemaji Waghaji Jat v. Bhikhabhai Khengarbhari Harijan and others** ((2009) 16 Supreme Court Cases 517) and **Mohd.Zainulabudeen v. Sayed Ahmed Mohideen and Others** (1990 (1) Supreme

Court Cases 345) wherein it was reiterated that an open assertion of right and denial of right of the other co-heirs coupled with exclusive possession was available and hence the properties were not partible.

15. The evidence reveal that the first defendant was in exclusive possession of the property. There are indications that he has constructed building, carried improvements and there was an averment that the loans were also obtained from the bank. However, the evidence regarding ouster seems to be limited or rather insufficient. It is pertinent to note that the property vested in him by virtue of Ext.A1 in 1976. There was a covenant that the property shall not be alienated during the life time of Kochudevasy. There were conditions regarding payment of money to other legal heirs of Rosa. Evidently, he claims his right on the strength of Ext.A1 and hence he could set up the plea of ouster as against other co-owners at least only thereafter. Since his right is relatable to a document of conveyance, it is doubtful as to whether the plea of ouster is sustainable. Since he was asserting his right over the plaint

schedule properties on the strength of settlement deed as against plaintiffs 3 to 5, he could not have at the same time set up a plea of ouster as against plaintiff 1 and 2 with respect to the same property. This will lead to a incongruous situation. This was answered by the learned counsel for the first defendant stating that his defence as against plaintiffs 1 and 2, and the plaintiffs 3 to 5 are different and he could have set up these two separate defences had suits been separately instituted by those parties. Merely because a composite suit has been filed by the plaintiffs as against him, the first defendant could not be denied his right of defence. There is some basis in the defence set up by the first defendant in this regard. However, the plea of ouster appears to be not sustainable for the reason that evidence to prove ouster is insufficient. There is absolutely no evidence to show that the first defendant had an animus to hold the property to the exclusion of all other co-owners openly and consciously.

16. An evaluation of the entire evidence lead to the conclusion that the judgment and decree of the court below holding Exts.B1 and B3 to B5 as not sustainable is liable to be set

aside. It is held that Ext.B1 has been validly executed and the obligations created by the settlement deed have been validly discharged. To that extent Exts.B3 to B5 are also sustainable.

17. Regarding the relief to be granted, sufficient evidence is available on record for moulding reliefs. Both sides did not have a case that the parties could not adduce sufficient evidence. In the above circumstances, we do not feel that for the mere purpose of working out the division of property and re-allotment of shares, the matter is liable to be remanded to the court below.

18. Ext.B1 was executed by Kochudevassy and the first defendant in relation to the property of Rosa covered by document No.1153/117 and undivided property of Devassy and Augusthy, shown as plaint B schedule covered by document No.1153/1117. By Exts.B2 and B3, the defendants 2 and 3 have released their rights with respect to all the properties above, in favour of Kochudevassy.

19. In the light of the above findings, allotment of shares in favour of the parties who are entitled to shares have to be re-worked. After the death of Rosa, her rights over plaint A

schedule property have devolved on Kunjeliya, Kochurosa, Kunjannam and Kochu Devasy. Since Augusthy and Kochappan died issueless, their rights devolved on the above four persons. On execution of the release deed by Kunjeliya and Kochurosa, their rights devolved on Kochudevasy. Hence, the rights are to be worked out in between Kochudevasy and Kunjannam. Kochudevasy has executed Ext.B1 settlement deed by which his entire rights over A schedule properties devolved on the first defendant alone to the exclusion of plaintiffs 3 to 5, who are the other legal heirs of Kochudevasy. The first defendant alone is entitled to succeed to the estate of Kochudevasy in the light of Ext.B1 settlement deed. Hence, $3/4^{\text{th}}$ of the rights of the plaintiff A schedule property should vest with the first defendant and the remaining $1/4^{\text{th}}$ share will devolve jointly on the legal heirs of Kunjannam, who are the plaintiffs 1 and 2.

20. In relation to the B schedule property jointly held by Augusthy and Kochudevasy, one half right of Kochudevasy in relation to plaintiff B schedule property have completely devolved on the first defendant by virtue of Ext.B1. The remaining one

half right of Devasy, after his death, devolved on Kunjelya, Kochurosa, Kunjannam Kochudevasy equally. Out of the above one half right, $\frac{1}{4}^{\text{th}}$ each devolved on Kunjelya and Kochurosa vested with Kochudevasy in the light of the release deed. The above rights along with the $\frac{1}{4}^{\text{th}}$ right over the undivided right of Augusthy which vested with Kochudevasy also devolved on the first defendant exclusively, in the light of Ext.B1 settlement deed. This works out to $\frac{1}{2}$ plus $\frac{3}{8}$ share on the first defendant and the legal heirs of Kunjannam (plainatiff 1 and 2) will get $\frac{1}{8}$ share jointly. Point answered.

21. In the light of the above findings, preliminary decree and the judgment passed by the court below is liable to be set aside. The appeal is allowed and the preliminary decree is passed as follows:

- 1). Exts.B1 and B3 to B5 are held to be valid.
- 2). The plaint A schedule property will be divided into four equal shares and the first defendant will be allotted $\frac{3}{4}^{\text{th}}$ share and the remaining $\frac{1}{4}^{\text{th}}$ share jointly to the first and second plaintiffs.

3). Plaint B schedule property will be divided into eight equal shares and $1/8^{\text{th}}$ will be jointly allotted to the first and second plaintiff and the remaining $7/8^{\text{th}}$ share to the first defendant.

4). The equities, reservation and quantum of mesne profits will be worked out in the final decree proceedings.

5). The cost shall come out of the estate.

6). Any of the party entitled for share as above may apply for passing the final decree within a period of six months from today.

Appeal allowed as above.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge.

dpk

/True copy/ PS to Judge

