

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

OP (FC).No. 486 of 2015 (R)

IN IA 2379/14 IN OP 1205/2010 OF THE FAMILY COURT, THIRUVANANTHAPURAM

PETITIONERS:

1. FRANCIS XAVIER SILVA, AGED 69 YEARS
S/O.BENCHAMIN SILVA, TC NO.45/1054, VINCENT NIVAS
WATTS ROAD, CHERIYATHURA, VALLAKADAVU P.O.
THIRUVANANTHAPURAM DISTRICT
NOW RESIDING AT 90 JALAN-TAY KIA HONG
TAMAN SRI LALANG 81900, KOTA TINGGI, JOHOR WEST
MALAYSIA
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER GEORGE REBERA
S/O.RAJAPPAN REBERA, ANAN'S DALE, TC NO.71/1061-2
CHERIYATHURA, VALLAKADAVU PO
THIRUVANANTHAPURAM DISTRICT.
2. DAVID SILVA
S/O.BENCHAMIN SILVA, TC NO.45/1054, VINCENT NIVAS
WATTS ROAD, CHERIYATHURA, VALLAKADAVU PO
THIRUVANANTHAPURAM DISTRICT
NOW RESIDING AT 90 JALAN-TAY KIA HONG
TAMAN SRI LALANG 81900, KOTA TINGGI, JOHOR WEST
MALAYSIA
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER GEORGE REBERA
S/O.RAJAPPAN REBERA, ANAN'S DALE, TC NO.71/1061-2
CHERIYATHURA, VALLAKADAVU PO
THIRUVANANTHAPURAM DISTRICT.
3. CAROL ANN METZNER
D/O.ESABLE BENCHAMIN SILVA, TC NO.45/1054
VINCENT NIVAS, WATTS ROAD, CHERIYATHURA
VALLAKADAVU PO, THIRUVANANTHAPURAM DISTRICT
NOW RESIDING AT APARTMENT 205-522, MOBRLY ROAD
VANCOUVER, BCV 5Z4G4, CANADA
REPRESENTED BY HER POWER OF ATTORNEY HOLDER GEORGE REBERA
S/O.RAJAPPAN REBERA, ANAN'S DALE, TC NO.71/1061-2
CHERIYATHURA, VALLAKADAVU PO
THIRUVANANTHAPURAM DISTRICT.

BY ADVS.SRI.D.KISHORE
SMT.MINI GOPINATH

RESPONDENTS:

1. JOLSANA
D/O.RATHINAMA, TC NO.45/10512, JOLSANA BHAVAN
VALLAKKADAVU PO, THIRUVANANTHAPURAM DISTRICT-695 002.
2. ESABEL BENCHAMIN SILVA
W/O.BENCHAMIN SILVA, TC NO.45/1054, VINCENT NIVAS
WATTS ROAD, CHERIYATHURA, VALLAKADAVU PO
THIRUVANANTHAPURAM DISTRICT-695 002.

R1 BY ADVS. SRI.D.SAJEEV
SRI.K.SREEKUMARAN NAIR

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
19-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 486 of 2015 (R)

APPENDIX

PETITIONER(S) ' EXHIBITS

- EXT P1 : TRUE COPY OF THE OP 1205/2010 OF FAMILY COURT, THIRUVANANTHAPURAM.
- EXT P2 : TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE 2ND RESPONDENT IN
OP 1205/2010 OF FAMILY COURT, THIRUVANANTHAPURAM.
- EXT P3 : TRUE COPY OF THE AFFIDAVIT AND PETITION IN IA 1673/2013 OF FAMILY
COURT, THIRUVANANTHAPURAM.
- EXT P4 : TRUE COPY OF THE ORDER DT 21-2-2014 IN IA. 1673/2013 OF FAMILY
COURT, THIRUVANANTHAPURAM.
- EXT P5 : TRUE COPY OF THE AFFIDAVIT AND PETITION IN IA. 740/2014 IN IA.
1673/2013 IN OP 1205/2010
- EXT P6 : TRUE COPY OF THE AFFIDAVIT AND PETITION IN IA 2379/2014 OF FAMILY
COURT, THIRUVANANTHAPURAM.
- EXT P7 : TRUE COPY OF THE OBJECTION FILED BY THE 1ST RESPONDENT TO EXT P6
- EXT P8 : TRUE COPY OF THE BAPTISM CERTIFICATE PERTAINING TO THE 1ST
PETITIONER.
- EXT P8 (A): TRUE COPY OF THE BIRTH CERTIFICATE PERTAINING TO THE 2ND
PETITIONER.
- EXT P8 (B) : TRUE COPY OF THE BIRTH CERTIFICATE PERTAINING TO THE 3RD
PETITIONER.
- EXT P9 : TRUE COPY OF THE DOCUMENT PRODUCED AS EXT A10 BEFORE THE FAMILY
COURT.
- EXT P10 : TRUE COPY OF THE ORDER DT 14-9-2015 IN IA. 2379/2014 IN OP
1205/2010 OF FAMILY COURT, THIRUVANANTHAPURAM.

RESPONDENT(S) ' EXHIBITS : NIL

//TRUE COPY//

P.A.TO JUDGE

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C.K.ABDUL REHIM & MARY JOSEPH, JJ.

OP (FC) No. 486 of 2015

Dated this the 19th day of October, 2015

JUDGMENT

Abdul Rehim, J.

The petitioners herein are the petitioners in I.A.No.2379/2014 in OP.No.1205/2010 on the files of the Family Court, Thiruvananthapuram. In the interim application, the petitioners sought for impleadment as additional respondents 2 to 4 in the original petition, which was instituted by the 1st respondent herein against the 2nd respondent. The original petition was filed seeking for a declaration that the 1st respondent is the wife of late Sri. B. Vincent Silva and to declare that she has got title over the scheduled properties and Bank Deposits which are standing in the name of the deceased Sri.B. Vincent Silva (hereinafter referred to as the deceased). The 2nd respondent herein is the mother of the deceased. The 2nd respondent had filed written statement before the court below, refuting the contention that the 1st respondent is the wife of the

deceased. It is contended that the deceased was having a legally wedded wife, who died on 14.12.2000. According to the 2nd respondent, the 1st respondent was only a maid servant working in the house of the deceased and there existed no legally valid marital relationship between the 1st respondent and the deceased. The petitioners herein have approached the court seeking impleadment on the premise that, the deceased at the time of his death had left behind his mother, who is the 2nd respondent herein, two brothers and one sister, as his legal heirs. It is contended that those legal heirs alone are entitled to inherit to the estate of the deceased, under the Indian Succession Act. It is also contended that, since the 1st respondent had raised a right over the property of deceased, the appellants are necessary parties, having interest in the subject matter of the original petition. They contended that the suit was instituted by the 1st respondent without impleading all the legal heirs of the deceased. It is also contended that the petitioners would be adversely affected if the reliefs sought for in the original petition is granted in favour of the 1st respondent, without affording them with any opportunity to contest the case.

2. But, the court below had dismissed the impleading

petition (IA.No.2379/2014) mainly based on three grounds. It is observed that the 1st respondent had resisted the impleading application contending that the petitioners are mere strangers and that the allegation that they are the legal heirs of the deceased, is totally incorrect. Secondly it is found that the petitioners in the IA had filed an earlier application as IA.No.1673/2013, which was dismissed as not pressed, and therefore the present IA is not maintainable. Further it is observed that, despite the specific direction issued by the court below, the petitioners have failed to produce any legal heirship certificate to substantiate their contention. It is aggrieved by dismissal of the application for impleading, the above original petition is filed by invoking jurisdiction vested on this court under Article 227 of the Constitution of India.

3. Contention of the petitioners are mainly that, there were ample evidence available before the court below to prove that the petitioners 1 and 2 are the brothers and the 3rd petitioner is the sister of the deceased. The petitioners have relied on a document produced by the 1st respondent herself, which is already marked in evidence as Ext.P10. It is a certificate issued by the Deputy Tahsildar, Taluk Office,

Thiruvananthapuram, on an application submitted by the 1st respondent herself. The certificate would indicate that there is no document available to prove that there occurred any marriage between the 1st respondent and the deceased. But it is mentioned that they were living together for about 5 years. It is further certified that the mother of the deceased is alive and she is now living at Malaysia. In the certificate it is specifically mentioned that, apart from the mother, there are two brothers and one sister of the deceased, who are permanently residing at Malaysia. The name of the sister and brothers shown in the said certificate is the names of the petitioners. Therefore, it is contended that the court below ought have considered the said document in order to repel the contentions raised by the 1st respondent that the petitioners are total strangers.

4. Learned counsel for the petitioners contended that, the impleading application should not have been disallowed based on the filing of an earlier application. It is submitted that, I.A.No.1673 of 2013 was filed through the power of attorney holders of the petitioners. But the court below has not accepted the power of attorneys produced, and therefore the petitioners were not permitted to appear through the lawyer engaged.

Hence the said application happened to be dismissed on the basis that the petitioners were absent. Subsequently a review petition filed as I.A.No.740 of 2014 was withdrawn by the petitioners, because by the time they have obtained properly executed power of attorneys. The present application, I.A.No.2379 of 2014 was filed on the strength of the new power of attorneys, which are duly executed. Since the earlier application was not dismissed on merits and since that interim application was not entertained because of technical reasons, there will not be any bar in filing a subsequent application, is the argument.

5. With respect to the findings that the petitioners have failed to produce any legal heirship certificate despite the specific direction issued in that respect, the petitioners contended that, once the relationship of the petitioners with the deceased could be established before the court below, there is no necessity to produce any legal heirship certificate, because the question regarding inheritance of the estate will be governed by the personal law of succession applicable to the parties. Even if production of any legal heirship certificate is necessary, that need to have been insisted only at the stage of trial, is the contention.

6. Per contra, learned counsel for the 1st respondent argued that the attempt of the petitioners is only protract the case. According to him, it is the burden of the petitioners to prove before the family court that they are the legal heirs of the deceased. Without discharging such burden, the impleadment sought for could not be accepted, is the contention.

7. Basic parameters upon which the court below ought to have decided the issue of impleadment, is as to whether the parties are persons having interest in the subject matter of the suit and whether they are parties who will be affected by the ultimate decree which will be passed in the suit. In the case at hand, the 1st respondent is seeking declaration of title on the immovables and movables of the deceased. It is not clear from the pleadings in the original petition, copy of which is produced as Ext.P1, as to what is the basis upon which the 1st respondent is claiming right and title over the said properties. Even though a declaration is sought for to the extent that she is the wife of the deceased, there is no specific averments that she is the sole legal heir of the deceased and that she is entitled to inherit the estate of the deceased, exclusively. However, we take note of the fact that there is a clear averment contained in Ext.P1

petition to the effect that, the deceased is having a younger brother by name Francis @ Stephen residing at Watts Road, Cheriyaathura, Thiruvananthapuram. It is evident that the said younger brother is the 1st petitioner herein. Further it is evident that the petitioners have produced documents before the family court, such as Baptism Certificate, Birth Certificate etc., which would reveal the name of their father. Apart from that the Certificate of the Deputy Tahsildar produced by the 1st respondent would indicate the petitioners are brothers and sister of the deceased. Therefore, prima facie, the materials available before the court below would indicate that the petitioners are the siblings of the deceased. Of course, despite such impleading being allowed, the 1st respondent should be reserved with liberty to dispute such relationship. The insistence for production of the legal heirship certificate would be insignificant, if it is proved that the petitioners are the siblings of deceased, for the purpose of taking a just and proper decision with respect to the claim of the 1st respondent. This is because, the relevant personal law of inheritance will govern succession of the estate of the deceased. Therefore it cannot be found that the petitioners are total strangers, who are not even entitled to dispute the claim of the

1st respondent in the suit. We are of the considered opinion that the filing and dismissal of an earlier interim application for impleading or filing of the subsequent review petition, will not operate as res judicata with respect to the present application, because the issue was not considered on merits.

8. From the materials available, prima facie, this court is of the considered opinion that, it cannot be successfully disputed that the petitioners are persons having interest in the subject matter of the suit. They are parties who may be affected by the ultimate decision in the suit. Moreover, by impleadment of the petitioners herein as additional respondents, no substantial prejudice will be caused to the 1st respondent. The adjudication on the rival claims of the parties will totally depend upon the evidence on record, which will be adduced before the court below. Hence we are inclined to observe that there is an erroneous exercise of jurisdiction vested on the court below, in dismissing the impleadment sought for.

9. Hence the writ petition is hereby allowed and Ext.P10 order passed by the family court, Thiruvananthapuram in I.A.No.2379 of 2014 in O.P.No. 1205 of 2010 will stand set aside. The said I.A will stand allowed and the family court is directed to

implead the petitioners as Additional respondents 2 to 4 in O.P.No. 1205 of 2010.

10. However, this court makes it clear that the impleadment allowed as above will not confer any right on the petitioners with respect to the issues involved in the case, which is being agitated before the court below, which will be decided independently based on the evidence on record and on the basis of the relevant provisions of law applicable. It is made clear that the 1st respondent will be at liberty to take all contentions against respondents 1 to 4, including the contentions with respect to their relationship with the deceased.

C.K.ABDUL REHIM, JUDGE

MARY JOSEPH, JUDGE

Pmn/

