

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

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

RSA.No.1110 of 2003 (F)

AGAINST THE JUDGMENT IN AS 16/2003 of III ADDITIONAL DISTRICT
COURT (ADHOC) FAST TRACK COURT No.1, THRISSUR DATED 31-03-2003

AGAINST THE JUDGMENT IN OS 583/1984 of PRINCIPAL MUNSIF COURT,
IRINJALAKUDA DATED 23-12-1994

APPELLANTS/APPELLANTS 2 TO 7:

1. MRS.SARADHA SUGATHAN, ELANTHOLIL HOUSE,
IRINJALAKUDA VILLAGE, MUKUNDAPURAM TALUK,
MANTHRIPURAM P.O., IRINJALAKUDA - 680 121, AGED 53,
HOUSE HOLD AFFAIRS, THRISSUR.
2. MRS.SULOCHANA VISWANANTHAN, AGED 48,
HOUSE HOLD AFFAIRS, CHATHAMKUDATH HOUSE, EDAKULAM
DESOM, POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK,
THRISSUR DISTRICT, EDAKULAM SOUTH, P.O. EDAKULAM, VIA
IRINJALAKUDA.
3. MRS.VALSALA VISWAMBHARAN, AGED 45 YEARS,
HOUSE HOLD AFFAIRS, EKKADAN HOUSE, P.O. MUPLIYAM,
MUPLIYAM VILLAGE, MUKUNDAPURAM VILLAGE, THRISSUR.
4. T.K. RAVEENDRANATHAN, S/O. KORU, THAIPARAMBIL HOUSE,
KALPARAMBA, POOMANGALAM VILLAGE, MUKUNDAPURAM
TALUK, AGED 38 YEARS, DRIVER, P.A. ARIPALAM - 680 688,
THRISSUR.
5. T.K. SURAJBABU ALIAS SURESH, S/O. THAIPARAMBIL KORU,
AGED 36, BUSINESS MAN, KALPARAMBA, POOMANGALAM
VILLAGE, MUKUNDAPURAM TALUK P.O., ARIPALAM,
-DO- -DO-.
6. T.K. UNNIKRISHNAN, S/O.THAIPARAMBIL KORU, AGED 29,
COMPANY EMPLOYEE, KALPARAMBA, POOMANAGALM VILLAGE,
MUKUNDAPURAM TALUK P.O., ARIPALAM, -DO- -DO-.

BY SRI.GOVIND K.BHARATHAN (SENIOR ADVOCATE)
BY ADVS. SMT.M.HEMALATHA
SRI.MANU MOHAN

RESPONDENTS/RESPONDENTS:

1. P.K. MANI @ VELAYUDHAN, AGED 66,
S/O. LATE PARAKKAL AYYAPPAN, POOMANGALAM VILLAGE,
MUKUNDAPURAM TALUK. (DIED. (DELETED).
2. KURUMBAKUTTY, AGED 96, W/O.PARAKKAL LATE
KOCHAYYAPPAN, POOMANGALAM VILLAGE, MUKUNDAPURAM
TALUK. (DIED) (DELETED).
3. SULOCHANA, AGED 47, PARAKKAL KUNGITTY,
W/O.ERUMAKKAT PARAMBIL KUNJITTY, VALLIVATTAM VILLAGE,
MUKUNDAPURAM.
4. CHITHRALEKHA, W/O.KOLLENGARA K.K. RAVI, IRINJALAKUDA
VILLAGE, MUKUNDAPURAM TALUK.
5. MADHAVI, AGED 89, W/O. PARAKKAL KUNJUTTY,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
6. P.M. KOCHUPENNU, AGED 64, W/O. P.A. VELAYUDHAN,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
7. P.M. KOCHAKKAN, AGED 61, PLOT No.233, BLOCK D, RESERVE
BANK STAFF QUARTERS, BYCULLA, BOMBAY - 400 008. (DIED.
LRS. RECORDED) (DELETED).
8. P.M. NARAYANI, AGED 59, W/O.VELLYYATH NARAYANAN,
MURIYADU VILLAGE, MUKUNDAPURAM TALUK.
9. JANAKY, AGED 56, W/O. VAZHOOR SUBRAMANIAN,
MADAICONAM VILLAGE, MUKUNDAPURAM TALUK.
10. CHANDRAVATHY, AGED 53, W/O.KIZAKOODAN NARAYANAN,
MADAICONAM VILLAGE, MUKUNDAPURAM TALUK.
11. RAMAN, AGED 39, S/O.THUDAMMA AND PERUKULLAM
VELAYUDHAN, PULLUT VILLAGE, MUKUNDAPURAM TALUK.
12. KUNJITTY, AGED 56, S/O.ERUMAKATTUPARAMBIL
KUNJUKANDH, VALLIVATTAM VILLAGE, MUKUNDAPURAM
TALUK.
13. LONAPPAN, AGED 46, MECHANIC, S/O.PALAMATHATHENGAL
ABRAHAM, POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
14. KRISHNA MENON, AGED 59, S/O.PYNGAL MADHAVIYAMMA,
KIZHAKENCHALAKUDY VILLAGE, MUKUNDAPURAM TALUK.

15. APPU, AGED 56, S/O.KOMPARUPARAMBIL RAVUNNY,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
16. VANAJA, AGED 36, D/O. PARAKKEL KUNJUTTY, POOMANGALAM
VILLAGE, MUKUNDAPURAM TALUK.
17. THRESSIAMMA, W/O.EDATHARA PARAMBIL LATE JOSEPH,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
18. ALBERT, S/O. LATE JOSEPH, EDETHAPARAMBIL HOUSE,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
19. BOBAN, S/O. LATE JOSEPH, -DO- -DO-
20. CHARLEY, S/O. LATE JOSPEH, -DO- -DO-
21. DENNY, S/O. LATE JOSEPH, -DO- -DO-
22. EDDY (MINOR), S/O. LATE JOSEPH, -DO- -DO-
REPRESENTED BY GUARDIAN THRESSIAMMA, 17TH
RESPONDENT.
23. KUNJIKALI, W/O. LATE VELAYUDHAN, PARAKEL HOUSE,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
24. VIJAYAN, S/O. LATE VELAYUDHAN,
PRESENT ADDRESS: P.V. VIJAYAN, EX. CHIEF, LEELA BEACH
HOTEL, GOA, MODAL GOA.
25. USHA RAJAN, D/O. LATE VELAYUDHAN, KOPATH HOUSE,
VADAKUMKARA VILLAGE, MUKUNDAPURAM TALUK.
26. LATHIKA UNNI KRISHNAN, S/O. LATE VELAYUDHAN,
URUNDOLY HOUSE, VADAKKUMKARA VILLAGE,
MUKUNDAPURAM TALUK.
27. GOPY, S/O. LATE VELAYUDHAN, PARAKEL HOUSE,
POOMANGALAM VILLAGE, MUKUNDAPURAM TALUK.
28. RENU, D/O. LATE VELAYUDHAN,
PARAKAL HOUSE, POOMANGALAM VILLAGE, MUKUNDAPURAM
TALUK.
29. P.K. SHEELA, AGED 33, D/O. LATE P.M. KOCHEEKKAN, B-25,
ASHISH SWAMI SAMARTH NAGAR, CROSS ROAD No.2,
LOKHANDWALLA COMPLEX, ANDHERI (W), MUMBAI - 400 053.
(ADDITIONAL 29TH RESPONDENT).
30. P.K. SHYLA, AGED 23, D/O. LATE P.M. KOCHEEKKAN, B-25,
-DO- -DO- (ADDITIONAL 30TH RESPONDENT).

RSA.No.1110 of 2003 (F)

(IT IS RECORDED THAT THE LR_s OF DECEASED R1, 2 & 7 ARE ALREADY ON THE PARTY ARRAY AND HENCE RESPONDENTS 1, 2 & 7 ARE DELETED FROM THE PARTY ARRAY AS PER ORDER DTD.16.3.2012 VIDE MEMO DTD.31.01.2012 BEARING CF 867/12).

(RESPONDENTS 29 & 30 ARE RECORDED AS LR_s OF THE DECEASED SEVENTH RESPONDENT AS PER ORDER DTD.27.07.2005 IN RSA 1110/2003).

R17 TO 19 & R22 BY ADV. SRI.T.N.MANOJ
R3, R4 & R12 BY ADV. SRI.K.A.SATHEESA BABU

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. No. 1110 of 2003
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Dated this the 28th day of July, 2015.

JUDGMENT

Making best out of what is available in the pleadings, Shri. Govind K. Bharathan, learned Senior Counsel appearing for the appellant tried to impress upon this Court that the courts below have missed the vital aspects of the case and that has resulted in a wrong decree being passed. The suit filed for partition was dismissed by both the courts.

2. Certain facts are not in dispute. The property in question belonged to Chathunny, who is the predecessor-in-interest of the parties. Chathunny had three sons, namely, Kochayyappan, Kunjitti and Mani, so also he had two daughters. It is not in dispute that Chathunny partitioned the property and settled the property in favour of Kochayyappan, Kunjitti and Mani. Kochayyappan and Mani by virtue of Ext.B1 document assigned their

property to one Theyyunni. Theyyunni in turn assigned the property to Kunjitti. Kunjitti is none other than the brother of Kochayyappan and Mani.

3. The suit related to three items of property. Item No.1 belonged to Kunjitti, Mani and Kochayyappan. Item Nos.2 and 3 belonged to Kunjitti which according to the plaintiff were purchased utilizing the income derived from item No.1. The plaintiff raised two fold contentions in the plaint. Pointing out that the family is governed by the customary law of the female having a share in the property and also assailing the assignment deed Ext.B1 by her father as a sham document, she claimed her share of the property. Her definite stand was that Ext.B1 was executed to screen the property from the clutches of the debtors and it was not intended to be a real transaction and the property continued to be in the possession of Kochayyappan and Mani. Claiming on

the basis of personal law as well as on legal basis, the suit was laid.

4. Defendants 3, 4 and 5 resisted the suit. It may be mentioned here that defendants 1 and 2 are the son and daughter-in-law of Kochayyappan and defendants 6 to 11 are the legal heirs of Mani. The contesting defendants pointed out that the personal law has no role to play in the matter and the allegation that Ext.B1 was a sham document cannot be countenanced. According to the defendants the present attempt is only an experimental one to upset the arrangement already made and that the plaintiff has no right in the property. It was also pointed out by the contesting defendants that the pleading regarding the custom put forward by the plaintiff is very meager and is far from satisfactory. Pointing out that the plaintiff is not entitled to any share in the property, they prayed for a dismissal of the suit.

5. 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 A7 from the side of the plaintiff. The contesting defendants examined D.W.1 and had Exts. B1 to B19 marked. Both the courts below found that the pleading and claim regarding the custom followed is far from satisfactory and therefore of the view that the question does not arise for consideration. As far as the challenge to Ext.B1 was concerned, both the courts below found that the plaintiff had miserably failed to establish that it was a sham document and it was executed with the intention of screening the property from the debtors of Kochayyappan. Holding that Kochayyappan at the time of his death has no property which could be inherited by the plaintiff, the suit was dismissed.

6. The disappointed plaintiff carried the matter in appeal as A.S. 16 of 2003. It may be

mentioned here that during the pendency of the suit the original plaintiff died and her legal heirs were brought on the party array.

7. Before the appellate court also the very same contentions were pursued with much vigour and vehemence, but the lower appellate court also found that they cannot be countenanced for the very same reasons given by the trial court resulting in dismissal of the appeal.

8. Notice has been issued on the following question of law:

Whether in the facts and evidence on record courts below were right in holding that as per the custom prevailing in the community of Kochin Thiyyas, prior to 1115 M.E., female children have no right in the properties of their father.

9. Shri. Govind K. Bharathan, learned Senior Counsel appearing for the appellants contended that the courts below have misdirected themselves both on facts and in law in dealing with the issues involved in the case. Relying on the

decisions reported in **Thankammal v. Madhavi Amma** (1966 K.L.T. 181), **Kunjuraman Kani v. Sankaran Kani** (1971 K.L.T. 458) and **Kandan Narayanan Namburipad v. Parameswara Menon** (25 Cochin Law Report 303) it was contended that when the parties are shown to be governed by a particular customary personal law, it is well settled that the customary law prevails and it is an exception to Mithakshara Law and custom determines the rights of parties. Relying on Ext.A1 document, it is contended that that fortifies the fact that the female members of the family have rights in the property and if that be so, by the custom pleaded in the plaint, the plaintiff is also entitled to a share being a female member of the family. This crucial aspect has been omitted to be noticed by the courts below and the courts below have proceeded on the basis as if the issue is irrelevant. Further, it was contended that Ext.B1 document said to have been executed by Kochayyappan and Mani was only a sham

transaction which was entered into screen the property from being proceeded against by the debtors of those persons and there was no intention to assign the property. Contending that the property so assigned continued to be in the possession of Kochayyappan and on the basis of customary law share was claimed. Learned Senior Counsel also contended that there was no justification to decline relief to the plaintiff.

10. Learned counsel appearing for the respondents pointed out that the question as to the customary law etc. may not have much of a relevance if this Court finds that Ext.B1 is a valid document. It is emphasised by the learned counsel for the respondents that there is no challenge as to Ext.B1 being an incompetent document or a document executed far in excess of the rights enjoyed by Kochayyappan and Mani, so as not to bind the plaintiff. The only claim is that it is a sham transaction and the document has not come into

effect. It is also contended that on a reading of the plaint claim, one has no doubt that the plaintiff claimed as a legal heir of Kochayyappan and not as a member of the family. The courts below were therefore justified in finding that there is nothing to show that Ext.B1 is a sham document and nothing else survives for consideration and in declining to grant relief to the plaintiff.

11. After having heard learned counsel for both sides, and after having perused the records, there seems to be considerable force in the submission made by the learned counsel for the respondents.

12. True, a very vague pleading is made regarding the custom followed by the family. But as rightly pointed out by the learned counsel for the respondents, Ext.B1 is not assailed on the ground that Kochayyappan and Mani were incompetent to enter into such a transaction or they had

exceeded their power and they had dealt with the properties of the plaintiff without authority. The sole attack on Ext.B1 was that it was a sham transaction and to be more precise, it was executed to preserve the property from being proceeded against by the debtors of defendants. The further contention was that the property continued to be in the possession of Kochayyappan and Mani.

13. It may be noticed here that Kochayyappan and Mani by Ext.B1 document had assigned the property to Theyyunni. Theyyunni in turn by Ext.A2 document assigned the property in favour of Kunjitti, who is the father of defendants 3, 4 and 5. Admittedly, Kunjitty was employed abroad and had financial resources to purchase the property. The result of purchase by Ext.A2 was Kunjuttu became the sole owner of the property which is partitioned by Chathunny giving properties to all the three sons.

14. As regards the custom pleaded, there is want of sufficient pleadings and the evidence is extremely meager. The question of going into the customary rights etc. or the personal rights of parties would arise only if it is found that Ext.B2 is vitiated. One must remember here that the plaintiff has not claimed partition on the basis that she is a member of the family, but only as a legal heir of Kochayyappan. In fact, she confines her claim to the property obtained by Kochayyappan in partition effected by the parties and their predecessor. Strictly speaking, the real issue that arises for consideration is whether the claim that Ext.B2 is a sham document is established or not.

15. Both the courts below have concurrently found that there is want of evidence of the two assignors having incurred debts so as to necessitate assignment of property to save it from debtors. It must be noticed that Ext.A2 is dated

6.9.1102 and Ext.B2 executed by the assignee of Kochayyappan and Mani, namely, Theyyunny, in favour of Kunjittan is dated 29.8.1108.

16. There were several litigations in between and in some of which the parties herein were also parties.

17. In O.S. 36 of 1968 which was instituted by defendants 3, 4 and 5 as against defendants 1 and 2 who are the legal heirs of Kunjitty, it was found that the document executed was not a genuine document and has no legal validity. It was also held that the property exclusively belonged to Kunjitty and that his legal heirs alone have right over the property.

18. One cannot omit to note that the plaintiff was not a party to the suit and therefore she may not be strictly bound by the decree in the suit. But one cannot also omit to note that her brother, sister-in-law were parties to the suit and they took the same contention as she would have had

she been a party to the suit. Whatever that be, the courts below were fully justified to the extent in holding that the decree in O.S. 36 of 1968 may not act as res judicata so far as the plaintiff is concerned.

19. But that gives no rights to the plaintiff and unless and until the plaintiff is able to establish that Ext.B2 document is a sham document, she cannot succeed. The plea based on customary law has already been referred to. There is no evidence except for the ipsi dixit of P.W.1 that Kochayyappan, her father, was deep in debts. There is no evidence at all in this regard. One also fails to understand that if as a matter of fact Kochayappan was deep in debts, there is no reason for Theyyunni to have assigned the property to Kunjitty and it would have been far more safe for Theyyunni to give the property to Kochayyappan. This also betrays the claim made by the plaintiff that Ext.B2 is a sham document.

20. At the risk of repetition, one may observe that the claim of the plaintiff is not as a member of the family, but as a legal heir of Kochayyappan. She has no grievance that Ext.B1 executed by Kochayyappan was an incompetent document far in excess of the rights which he enjoyed and that it did not affect her rights. On the other hand, the claim was that it was a sham document. In other words, she did not challenge the authority and power of Kochayyappan to execute the document.

21. It was the above facts which weighed with the courts below in coming to the conclusion that the plaintiff is not entitled to succeed in the suit. This Court finds no reason to interfere with the finding of the courts below. The findings of the courts below are based on appreciation of evidence and are questions of fact. It is not shown that the findings are either perverse or unwarranted on the pleadings and evidence in the

R.S.A.1110/2003.

14

case warranting interference under Section 100 of the Code of Civil Procedure.

The result is that this appeal is devoid of merits and it is liable to be dismissed. I do so. There will be no order as to costs.

sb.

P. BHAVADASAN,
JUDGE