

(1988) 09 KL CK 0014
In the High Court Of Kerala
Case No : S.A. No. 222 of 1983-B

Cherikkal Kunhamina

APPELLANT

Vs

Kakkam Veettil Mariyumma and Another

RESPONDENT

Date of Decision : 28-09-1988

Acts Referred:

Citation : (1988) 09 KL CK 0014

Hon'ble Judges : Varghese Kalliath, J

Bench : Single Bench

Advocate : T.V. Ramakrishnan, for the Appellant; G. Mohan, for the Respondent

Final Decision : Dismissed

Judgement

Varghese Kalliath, J.—The second defendant in a suit for partition is the appellant. The plaintiff claimed that she is the wife of one Assukutty and the property scheduled in the plaint belonged to Assukutty's mother Kayyumma and his sister Kunahmina. Kunhamina is the second defendant. Assukutty died. The plaintiff is the legal heir of Assukutty. The defendants resisted the suit. They contended that the plaintiff is not the wife of Assukutty. Further, they contended that Assukutty died as an unmarried person. The defendants also contended that even if the plaintiff had any right in the property she had lost that right on account of adverse possession and limitation.

2. The trial court after considering the evidence found that there was no sufficient material and evidence to establish the fact that the plaintiff is the wife of Assukutty. The trial court also found that assuming that the plaintiff is the wife of Assukutty she cannot claim partition since whatever rights she had, she lost it by adverse possession. The suit was dismissed.

3. The plaintiff filed an appeal. The appellate court did not agree with the trial court on both the points. The appellate court found that there are good evidence to establish the fact that the plaintiff is the wife of late Assukutty. The appellate court also found that the defendants have not discharged their onerous burden of

establishing a case of ouster; but the appellate court did not decree the suit in toto. It found that excluding an extent of 18 cents from the plaint schedule property, the plaintiff is entitled to a decree for 6/72 shares in the suit property. Now, the second defendant appeals.

4. Counsel for the appellant submitted that the appellate court has not considered the evidence properly in regard to the crucial question - whether the plaintiff is the wife of late Assukutty or not. Counsel submitted that the appellate court was not justified in relying on certain entries in the Nikhas register kept by Juma-ath, Kuthparamba. Ext.X1 is the register. This register was produced by PW1. He deposed that the entries have been made properly. He also said that though the entries are made not by him it was made by Kassim whose handwriting is familiar to him. I do not think that there is any justification for me to hold a different view from the view taken on this matter by this final fact finding court.

5. The next question that was considered by the appellate court was the question relating to ouster. The appellate court found that the co-owner who in possession of the property was not able to establish the case of ouster. Counsel for the appellant wanted to rely on the decision reported in Sooppi v. Moosa 1969 KLT 121. The appellate court also has referred to this decision. Certainly this is a well considered decision where all the aspects relating to ouster have been considered. But the position has been made very clear by recent decisions of the Supreme Court and of this Court. In the decision reported in Karbalai Begum Vs. Mohd. Sayeed and Another, the Supreme Court has held thus:

It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be that the co-sharer in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees.

It is a plain proposition of law that the possession of one co-owner is in law presumed to be on behalf of all the co-owners. On the face of this presumption the law impose a very heavy burden on the co-owner to establish whether there is exclusive possession of the property and that his exclusive possession would enable him to acquire title by adverse possession by ousting the other co-owners. Case law is in abundance on this topic. I am sure that it is not enough to establish ouster that the other co-owners or the co-owner have/has been in exclusive possession and enjoyment of the properties but he/they should establish by good evidence that their possession has been openly in repudiation and denial of title of the co-owner who was out of possession and to his knowledge. Perhaps, it may not be necessary to tell the co-owner who is out of possession that the co-owner in possession is repudiating title of the co-owner who is out of possession.

6. In this case, the counsel submitted before me that the document Ext.B4 would show that the plaintiff has been excluded from the joint ownership and in fact it shows a denial of the right now asserted by the plaintiff. It has to be remembered that Ext.B4 is a document executed by the mother Kayyumma in favour of the 2nd defendant. In this document the plaintiff is not a party. I do not think that this document can be pressed into service to establish a case of ouster.

7. The final fact finding court after considering the evidence in the case found that the second defendant has failed to establish her case that she has acquired title to the property exclusively by adverse possession and limitation. The judgment and decree of the appellate court is correct in law. I do not see any reason to interfere with the judgment and decree of the appellate court. The appeal is only to be dismissed. I do so. No costs.