

(2000) 10 KL CK 0009
In the High Court Of Kerala
Case No : A.S.No. 188 of 1991.

Jose

APPELLANT

Vs

Antony and Others

RESPONDENT

Date of Decision : 27-10-2000

Acts Referred:

Kerala Education Act, 1958 — Section 6

Citation : (2001) 1 KLJ 555

Hon'ble Judges : K.V. Sankaranarayanan, J

Bench : Single Bench

Advocate : K. Jayakumar, for the Appellant; T.O. Xavier, Public ProsecutorJnanasekharan, K.Aravindaksha Menon, George Thomas, A. Parvathy Menon and T.C. Silma, for the Respondent

Final Decision : Dismissed

Judgement

K.V. Sankaranarayanan

1. The plaintiff in O.S.No. 1005/87 on the file of the Sub Court, Thrissur is the appellant. The suit was for partition of one item of property measuring 33 x 36 six feet koles and forming part of Survey No. 62/2 Engandiyoor Village with the building thereon. The plaintiff claimed that, as per a partition deed of 1946, the property belonged to his father Iyyob, who died in 1961 leaving behind his wife Achayi, 4 sons and three daughters. Achayi also died in 1971. Neither had left behind any valid will or testament. The plaintiff further stated that a lower primary school under the ownership and management of Iyyob was transferred to the plaintiff before his death and the defendants had no claim over that property. He further stated that Celine, subsequently impleaded as the 6th defendant, who is one of the daughters Iyyob and Achayi, had executed a release of her share in favour of her mother and so, she had no right in the property. Another item of property owned by the father was sold in favour of one Visalakshi in 1977 by the plaintiff and the defendants together and only the plaint schedule property is available for partition. The plaintiff claimed 3/14th

share in the property scheduled in the plaint with share in profits from the defendants.

2. Defendants 1 to 3 filed a joint written statement. They contended that the school and the land, where the school building stood measuring 33 x 22 1/2 six feet koles, which formed Thak No.II in item No. 1 in B schedule to document No. 1685/1946 partition deed by which late Iyyob obtained the properties, was also available for partition. They denied the plaintiff's claim that he obtained ownership and management of the school for himself. He was in management only on behalf of the co-owners. That property was shown in a schedule to the written statement. Thus, the defendants contended that the property scheduled in the written statement must also be divided among all. They also contended that the sale of one item of property in 1977 was not for the necessity of the family, but was only to enable the plaintiff to go abroad and it must be adjusted from the plaintiff's share. The 5th defendant filed a separate written statement claiming partition of his share.

3. The plaintiff filed a reply statement and also applied for impleading the 6th defendant and the prayer was granted. In the reply statement, he contended that the management of the school and 10 cents of land, in which the building stood, were not available for partition.

4. On the pleadings, the learned Sub Judge framed issues. Both sides adduced evidence. On a consideration of the evidence, the learned Sub Judge found that the property scheduled in the written statement of defendants 1 to 3 including the school was available for partition. The learned Sub Judge discarded the plea that the two sisters who had joined a convent as nuns were not entitled to shares and held that they too were entitled to shares in the property. The learned Sub Judge rejected the prayer for reservation put forward by the 3rd defendant. The learned Sub Judge did not accept the evidence of the third defendant that the plaintiff was actually taking the income from a portion of the property and held that the defendants were liable to share in profits. The third defendant's exclusive claim for a motor and pump set in the property was also rejected but the learned Judge directed that it be set apart to his share on valuation on equitable considerations. The learned Sub Judge granted a decree for partition of a 1/7th share for the plaintiff and each defendant. Defendants 1 to 4 and 6 were also permitted to get their individual shares separately on payment of court fee.

5. Aggrieved by the decision that the school was available for partition and also that defendants 2 and 6 were also entitled to shares, the plaintiff has come up in appeal.

6. The points that arise for consideration in this appeal are: (1) Whether the school and right of management of the school are available for partition? (2) Whether defendants 2 and 6 are entitled to shares; what is the share due to the plaintiff and defendants?

7. Point No. 1: Admittedly, the plaint schedule property belonged to Iyyob, so also the property scheduled to the written statement of defendants 1 to 3. Iyyob was the manager of the school till before his death. He was also a teacher in the school. His wife, deceased Achayi was the Headmistress for some period. The plaintiff's wife is also a teacher of the school. 3rd defendant and his wife are also employed as teachers. 2nd defendant was also a teacher in the school, but left after she joined the convent. The plaintiff claims that the management of the school has been transferred to him by his father before his death as per Ext. A9. Ext. A9 dated 22.8.1961 is produced as a duplicate copy of an application for transfer of management. Iyyob died on 23.8.1961. The genuineness of Ext. A9 is disputed by the defendants. It is pointed out that there is a marked difference in the signature of late Iyyob found in Ext. A9 and the other documents available for comparison. Ext. A9 is seen attested by the then Village Magistrate, Engandiyoor. Ext. A9 is only a copy of the application submitted to the authorities for transfer of management. It purportedly bears the signatures of deceased Iyyob and the plaintiff as also the Village Magistrate. It is also a fact that the plaintiff has been in management of the school ever since the death of his father in 1961. He continued to be the manager even during the period he was abroad. The 3rd defendant as DW. 1 has admitted that the appointment orders for himself and his wife were issued by the plaintiff. Though it is not possible to find that Ext. A9 has been convincingly proved, there must have been such an application for transfer of management for the smooth transfer of management in favour of the plaintiff. The plaintiff claimed that the father had given him ownership of the property as well as the management of the school. The plaintiff has conceded that apart from Ext. A9, he has no other document to show transfer of the school compound or building or the management in his favour. The property itself could have been transferred only by a registered document. Any averment in Ext. A9 cannot be considered as a valid transfer of the rights of Iyyob in immovable property. Admittedly, no document transferring the immovable property has been executed or registered. So the plaintiff cannot claim exclusive right over the school compound and the school building based on Ext. A9 or the transfer of management in his favour. It is to be treated as common property available for partition. The school was under individual management. Only an individual could have been appointed as a manager. When Iyyob died, the plaintiff was the eldest son and some of the other children were only minors. The transfer and management in favour of the plaintiff could have been only in his position as the eldest son of the deceased. It is not possible to infer a gift of the management right in favour of the plaintiff or any exclusive right being conferred on the plaintiff by late Iyyob. So the management right also must be taken as a common property. It is well settled by the decision in *Marali Balan v. Maroli Dammu & Others* (1986 KLT 919 [DB]) that the management of a school can be the subject matter of partition. Partition of property will not amount to transfer. The bar u/s 6 of the Education Act is also not attracted. It is also to be noted that the bar is only in transferring the property of the school and not transfer of the school itself. Only the transfer of management will have to be

approved by the authorities. The decision cited above is also an authority as to how the school can be treated as a property and divided among the member's. In that case, the direction for sale of the school among the members of the family was upheld. In this case also the land and the building scheduled in the written statement as also the management right can be treated as partible property. It can be set apart to one of the members on proper valuation or to the person who is prepared to take it for the highest value. This a matter to be considered and decided in the final decree proceedings. The decision of the learned Sub Judge that the school is not the exclusive property of the plaintiff and it is available for partition is only to be upheld. The learned Sub Judge was justified in decreeing partition of the properties scheduled in the plaint and also in the written statement.

8. The finding by the trial court as regards the utilisation of the sale proceeds of the common properties sold in 1977 as also the claims of the 3rd defendant for exclusive rights and the liability for share and profits are not subject matter of dispute in this appeal.

9. Point No. 2: At the trial stage, the plaintiff contended before the lower court that defendants 2 and 6 were not entitled to shares as they had become nuns. The learned Sub Judge has considered the point and held that they were also entitled to shares in the property. It is seen that the question was argued before the trial court but it was not the subject matter of pleadings. The plaintiff had, in the plaint, conceded a share for the 2nd defendant. He wanted to deny a share for the 6th defendant only on the basis that she had executed Ext. A2 release of her share in 1967 in favour of the mother. But the plaintiff did not say whether she would obtain a share on the death of the mother. Before this court also, learned counsel for the appellant pointed out the decisions on the point. As pointed out by Sebastian Champappilly in his book on Christian Law of Succession in India, 1997 Edition, page 83, the view taken by the Kerala High Court is that on taking the perpetual vow, a nun will cease to have any connection with the members of her natural family. It is so found in *Mother Superior v. D.E.O., Kottayam* (1977 KLT 303) which is quoted with approval in *Oriental Insurance Company v. Mother Superior* (1994(1) KLT 868 [DB]). The Madras High Court in the matter of *Indian Succession Act. v. Rt. Rev. Casmir Gnanadesikan* (1990 (1) KLT 334) and the Karnataka High Court in *G.K.Kempegowda v. Smt. Lucinda* (AIR 1985 Karnataka 231) have taken a different view. But the decision of the Kerala High Court is binding. In *Mother Superior v. D.E.O., Kottayam* (1977 KLT 303), this court upheld the nomination of the Mother Superior for provident fund, gratuity etc. of a nun who was a school teacher. In *Oriental Insurance Company v. Mother Superior* (1994 (1) KLT 868) the claim by the convent for compensation on the death of a nun in a motor accident was upheld. The question of succession to the parents after becoming a nun had not directly come up for consideration. But the decisions have applied the principle of civil death in the case of a Hindu turning an ascetic, to a Christian becoming a priest or nun and held that they will sever connections with their

natural family. But it is to be noted that in this case, the plaintiff had conceded a share for the 2nd defendant and for the 6th defendant also, but for the fact that she had executed a release in favour of her mother. There is no evidence to show when they took the perpetual vow. If they had not taken the perpetual vow before the death of the father in 1961 and the death of the mother in 1971, they too would have become entitled to a share in the property. A Christian woman becoming a nun takes a perpetual vow only some time after joining the convent. In the absence of evidence on the point, it is not possible to deny a share for defendants 2 and 6. So the finding of the lower court that they too are entitled to shares also must be upheld. In this appeal, the 3rd respondent has produced a document executed by defendants 2 and 6 transferring their shares in his favour. He has claimed their share in the property. The transfer, if at all, can be challenged only by the mother superior of the convent. In the absence of such a challenge, the transfer can be recognised. In the final decree proceedings, the shares of defendants 2 and 6 can also be set apart to the share of the 3rd defendant. The 3rd defendant can seek necessary directions in the matter in the final decree proceedings. Similarly, the 4th defendant died pending this appeal. His legal representatives are brought on record. The share due to the 4th defendant will be allotted to them on payment of necessary court fee before the trial court. Since defendants 2 and 6 are entitled to shares, the plaintiff will be entitled to only a 1/7th share in the property, as found by the lower court. So, the finding on this aspect also can be upheld.

For the reasons stated above, the preliminary decree passed by the trial court is confirmed and this appeal is dismissed. However, the parties are directed to bear their own costs.