

(2016) 10 KL CK 0009

In the High Court Of Kerala

Case No : C.R.P. No. 241 of 2014.

**K.C. Abraham, S/o. Cherian, Puthukkayil House, Thangalam,
Kothamangalam - Petitioner @HASH Leena George, Palathinkal House,
Padmam-George Lane, Arunodayam Road, Thiruvankulam P.O., Pin
682305**

Date of Decision : 06-10-2016

Acts Referred:

Family Courts Act, 1984 — Section 7

Citation : (2017) 1 CivCC 248 : (2017) 1 CivilLJ 502 : (2017) 1 DMC 770 :
(2017) 2 ILRKerala 197 : (2016) 4 KLT 528

Hon'ble Judges : K. Ramakrishnan, J.

Bench : Single Bench

Advocate : Sri. Philip J. Vettickattu and Sri. B. Premnath (E), Advocates, for the
Petitioners; Sri. George Varghese Kizhakkambalam, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. K. Ramakrishnan, J. - The above revision has been filed by the defendants in O.S. 85/2012 on the file of the Sub Court, Muvattupuzha against the order in I.A. 1326/2012 in O.S. 85/2012 in that court under Section 115 of the Code of Civil Procedure.

2. The suit was filed by the respondent herein as O.S. 85/2012 on the file of the Sub Court, Muvattupuzha for partition of the plaint schedule properties. It is alleged in the plaint that respondent herein is the wife of Sri. Reji K. Abraham, who is the son of the first revision petitioner and brother of the second revision petitioner. The respondent married Sri. Reji K. Abraham on 31.01.1994. Due to some misunderstanding between them, they started residing separately and she filed O.P. 206/2001 before this court for dissolution of marriage and during the pendency of that proceedings, the respondent and the said Reji K. Abraham filed joint petition for divorce under Section 10A of Indian Divorce Act. This court passed a decree rule nisi. Thereafter respondent married a widower by name Biju Varghese on 26.08.2002, who was having a child. After sometime, there was some difference of opinion arose between the respondent and the said Biju

Varghese, she filed O.P. 783/2005 for restitution of conjugal rights against him and Biju Varghese filed O.P. 1220/2005 to declare the marriage as nullity as the earlier marriage with Reji K. Abraham was not dissolved and it was not confirmed after a period of six months after passing a decree nisi. The Family Court allowed O.P.1220/2005 and dismissed O.P. 783/2005 declaring the marriage as null and void. According to the plaintiff thereafter the Reji K. Abraham had taken her back and they resided together as husband and wife and while so, he died on 27.12.2006 due to heart failure. He was having right over the plaint schedule property which he obtained as per sale deed No. 6763/1986 of S.R.O. Kothamangalam. Since he died intestate, his right in the property devolved on the respondent as his wife and the first petitioner. The respondent filed M.A. 233/2007 before this court against the judgment in O.P. 1220/2005 and the same was also dismissed declaring the marriage as null and void by judgment dated 16.08.2007, holding that the first marriage of the respondent is still subsisting. The first petitioner had relinquished his share in the plaint schedule property as legal heir of Reji K. Abraham in favour of second petitioner. Though the respondent approached the revision petitioners, they were not amenable for partition. So she filed the suit for partition as wife of late Reji K. Abraham for dividing the plaint schedule properties into two equal shares and allotment of one such share to her. Revision petitioners appeared and filed joint written statement contending that the property is not available for partition. The plaintiff is not entitled to get any right as she is not the wife of the deceased as their marriage was dissolved and the dispute regarding the status of the petitioner is covered by Section 7 of the Family Courts Act as it comes within the explanation of (a) to (g) of Family Court Act and by virtue of Section 8 of the Family Court Act, the jurisdiction of the Civil Court is ousted. They also contended that, since the marriage has been dissolved, the plaintiff is not entitled to get any right and they prayed for dismissal of the suit.

3. The question regarding the jurisdiction of the Civil Court was considered by the court below as a preliminary issue and the court below found that the contention of the defendants that the suit is not maintainable before this court by virtue of Section 7 and 8 of the Family Courts Act is not sustainable and found that, that court has got jurisdiction as the jurisdiction is not barred by Section 7 read with Section 8 of the Family Court Act. Aggrieved by the same, the present revision has been filed by the petitioners who are the defendants before the court below.

4. Heard Sri. D. Premnath, counsel appearing for the revision petitioners and Sri. George Varghese Kizhakkambalam, counsel appearing for the respondent.

5. The counsel for the revision petitioners submitted that in view of the dictum laid down in *Linish P. Mathew v. Mruthula Mathew* (2012(3) KLT 428), it is not necessary to pass a decree nisi, in an application under Section 10A filed before the High Court in pending appeal, overruling the decision reported in *Sherly Thomas v. Johny* (2002 (1) KLT 467). So there is no cause of action for the

plaintiff to file the suit as she is no longer deemed to be the widow of the deceased whose property is sought to be partitioned as though a decree for nisi is passed at a time when there was no necessity to pass such a decree, it will be deemed to have been accepted and decree for dissolution has been passed on the basis of the joint petition filed at that time. Further she had married another person, thereby she had also accepted the verdict that she is the divorced wife and she is estopped from contending that she is the widow of late Reji K. Abraham and claiming partition of the property. He had also argued that, the decision relied on by the plaintiff to claim the status of the wife of deceased Reji K. Abraham, is not binding on the revision petitioners as they are not parties to that proceedings. So according to him, the court below was not justified in holding that there is cause of action for the plaintiff to file the suit. He had also argued that, since the status of the petitioner as the wife of deceased Reji K. Abraham, has been disputed, that can be decided only by a family court, which is a dispute falling under Section 7 of the Family Courts Act and by virtue of Section 8 of the Family Court Act, the Civil Court has no jurisdiction to entertain the suit and the suit ought to have been returned for filing before the proper court and that question should not have been relegated to a later stage by the court below as observed in the impugned order.

6. On the other hand, the counsel for the first respondent submitted that, Section 7 of the Family Courts Act will be applicable only in cases where there is dispute between the spouses regarding their status and only those things need be considered by the Family Court and on all other cases the Civil Court's jurisdiction is not ousted.

7. It is an admitted fact that Reji K. Abraham married the first respondent and after some time, their relationship strained and the respondent filed O.P. 206/2001 for dissolution of the marriage before this court and thereafter they filed a joint petition for divorce under section 10A of Indian Divorce Act and this court passed a decree nisi. It is also an admitted fact that the respondent herein married one Biju Varghese, a widower on 26.08.2002 and thereafter they have started residing separately and she filed O.P. 783/2005 for restitution of conjugal right against the said Biju Varghese and Biju Varghese filed O.P. 1220/2005 to declare the marriage between them as nullity as the earlier marriage with Reji K. Abraham was not dissolved as it was not confirmed after a period of six months after passing a decree of rule nisi. Both these cases were filed before the Family Court and the Family Court dismissed O.P.783/2005 filed by the respondent and allowed O.P.1220/2005 declaring the marriage between them as null and void as the decree of rule nisi passed was not confirmed after six months and there is no dissolution of marriage. It is also alleged in the plaint that the respondent filed Mat. Appeal 233/2007 against the judgment in O.P. 1220/2005 and the same was also dismissed by this court declaring the marriage as null and void by judgment dated 16.08.2007. According to the plaintiff, in the court below who is the respondent herein, after the Family Court declared the marriage between the respondent and Biju Varghese as null and void, Reji K. Abraham had taken back

her and treated her as his wife and started living together as husband and wife and while so Reji K. Abraham died on 27.12.2006. So according to the plaintiff, the relationship between them revived when the family court had declared the marriage between the plaintiff and Biju Varghese was declared as null and void as the earlier marriage was not dissolved and claimed to be the widow of late Reji K. Abraham, she filed the suit.

8. According to the defendants, who are the revision petitioners herein, in view of the dictum laid down in the decision reported in *Linish P. Mathew v. Mruthula Mathew* (2012 (3) KLT 428), there is no necessity to wait for six months for confirmation of decree nisi passed in view of the amendment made to Indian Divorce Act and once the joint petition is allowed, there is dissolution of marriage and the status of wife has been lost to the plaintiff. So there is dispute regarding the status of the respondent as to whether she is the widow of late Reji K. Abraham and that matter has to be decided for the purpose of granting or denying the relief of partition claimed by the plaintiff. There is no dispute regarding the fact that the property was purchased by late Reji K. Abraham as per sale deed No. 6763/1986 of S.R.O. Kothamangalam and he died intestate. As widow of the deceased Reji K. Abraham, the plaintiff filed the suit for partition of that property. So the status of the plaintiff is a question to be decided for the purpose of granting or denying relief to the plaintiff in the suit.

9. Section 7 of the Family Court Act reads as follows:

7. Jurisdiction - (1) Subject to the other provisions of this Act, a family court shall,-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purpose of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the family court extends.

Explanation:- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely,-

(a) suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of

a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise,-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

10. Explanation (a) to (g) of Section 7 deals with the categories of suits and proceedings which will have to be decided by the family court. Explanation-(b) to Section 7 says, a suit or proceeding for declaration as to the validity of the marriage or as to the matrimonial status of any person and that will fall within the jurisdiction of family court. Section 8 oust jurisdiction of Civil Court in respect of matters covered by Section 7.

11. In the decision reported in Abdul Jaleel v. Shahida [2003 (2) KLT 403(SC)] while considering the scope of explanation-C to Section 7 of the Family Courts Act, held as follows:

"The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected there with. From a perusal of the statement of objects and reasons, it appears that the said Act inter alia seeks to exclusively provide within the jurisdiction of the family court, the matters relating to the property of spouses or either of them. Section 7 of the Act provides for the jurisdiction of family court in respect of suits and proceedings as referred to in the explanation appended there to. Explanation-c appended to Section 7 refers to a suit or proceedings between the parties to the marriage with respect to the property of the parties or either of them". The wording "dispute relating to marriage and family affairs and for matters connected therewith", in the view of this, the court must be given a broad construction. The statements of objects and reasons as referred to herein before would clearly go to show that the jurisdiction of the family court extends inter alia in relation to properties of spouses or either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other irrespective of the claim whether the property is claimed during the subsistence of marriage or otherwise. It is now well settled principle of law that, the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to explanation-C

appended to Section 7 of the Act, in our opinion would frustrate the object wherefore the family courts were set up."

12. That was a case where the suit in respect of the properties obtained during the subsistence of the marriage in the name of one of the spouses, but there was an agreement between the parties, that it belongs to both and it was on that basis the suit was filed after the marriage was dissolved and the jurisdiction of the family court was raised on the ground that there was no subsistence of marriage at the time of filing of the suit and thereby the jurisdiction of the Family court is ousted, but that contention was repelled by the apex court.

13. In the decision reported in *Shyni v. George and Others* (1997(1) KLJ 573) it has been held that, even if a relative of the husband or stranger is a party to the suit filed by the spouse for recovery of the property, the jurisdiction of a Family Court is not ousted, on the scheme of the act and considering the confirmation of the jurisdiction of family court, it is clear that, a suit or proceeding between the parties to the marriage with respect to the property of the parties or either of them comes within the purview of the family court. That was a case filed by the wife against her husband and father-in-law for recovery of certain amounts belonging to her and the suit was filed before the family court. It was contended that, since father-in-law is also a party to the proceedings, the suit is not maintainable before the family court, but that contention was repelled by this court.

14. In the decision reported in *Mannan Khan v. Family Court* [2001 (1) KLT SN 81 (case No. 99) A.P], it has been held that the words parties to a marriage in explanation-e to section 7 parties to a marriage have to be construed as divorced spouses also and not only to parties whose marriage is subsisting.

15. In the decision reported in *Krishnan Nambudiri v. Thankamani* (1994(1) KLT 607), it has been held that clause-c to explanation 7(1) of the Act takes into fold, a suit or proceedings between the parties to a marriage with respect to the property of the parties or either of them. Therefore it is not enough that the suit is between the suit to the marriage, but the same should be with respect to the property of the parties or either of them. Here the subject matter of the suit belongs not only to the parties to the marriage, the plaintiff and the first defendant, but belongs to others also. In the context, it is necessary to remember that it is a contention of the first defendant/revision petitioner that the sisters are also entitled to a share. When contention of others also interested in the subject matter of the suit, like the suit for partition and they are also in the party array simply because among the parties a husband or wife also arrayed on rival sides that cannot attract clause-c of explanation to Section 7(1) of the Act. As per clause-c of explanation to Section 7 of the Act, which has to be strictly interpreted, the subject matter of the litigation should belong to the parties to the marriage or either of them. As noticed here, the case is the property belongs to others also, then certainly clause-c of the explanation to Section 7(1) of the Act will have no application and that will not oust the

jurisdiction of the Civil court by virtue of Section 8 of that court.

16. In the decision reported in *Devaki Antharjanam v. Narayanan Namboodiri* (2006(2) KLT 1022) it has been held that, a suit for partition implies existence of co-ownership right of sharers, they have pre-existence right in the co-ownership property, each sharer is entitled to claim his/her share, such sharer need not necessarily being a party to the marriage, the sharer other than a party to the marriage may seek for partition of his share against the other co-owners including persons who are parties to the marriage. Existence of such parties to a marriage in the array of defendants is not a ground to hold, that only the family court has jurisdiction. It is further held in the decision that, what is the meaning of the expression with respect to the property of parties occurring in explanation-c to section 7(1). Does it mean property of parties to the proceedings or property of parties to a marriage. The words "or of either of them" following the expression with respect to the property of the parties would unmistakably lead to the conclusion that the expression refers to the parties to a marriage and not parties to proceedings. In order to attract clause-c, the litigation must be with respect to the property of either the husband or wife or both of them. It excludes any other person who has independent right in respect of the property. Could it be said that the co-ownership property of the husband, wife and son is the property of party to the marriage or either of them. Evidently not. The ingredient of clause-c of explanation are not attracted in the present case. It cannot even be contended that the present case is covered by clause-d to explanation 7(1). Therefore I am of the view that, civil court had jurisdiction to decide the suit and that the decree is not a nullity.

17. In the decision reported in *Joseph v. Mariam Thomas* (2006(1) KLT 894), it has been held that, a stranger who is a purchaser of the property from the husband cannot maintain an application before family court for the property and in such cases the jurisdiction of civil court is not ousted. It has been observed in the decision that explanation to section 7 excludes the jurisdiction of the civil court only in certain matters, which are relating to proceedings between the parties to a marriage. of course, it includes a suit or proceedings for maintenance, but in this case the appellant is not a party to the marriage or he is not claiming any maintenance, he is a total stranger and his claim for property purchased from the husband cannot be brought him in clause-f to explanation 7 of the Family Court Act. It is only in such cases that the jurisdiction of civil court is ousted and in all other cases civil court continues to have jurisdiction.

18. In the decision reported in *Suprabha v. Sivaraman* (2006 (1) KLT 712), it has been held that, then either of the husband or wife is not alive and the suit is filed against the parents of either of them, it cannot be said that it is a suit or proceedings between the parties to the marriage. In the context of section 7-C, the meaning is that the parties to the marriage cannot be given such a wide interpretation so as to include all those who are interested in the welfare of the couple or those who take part to the marriage ceremony. Therefore the suit or

proceedings must be between the husband and the wife in respect of the property of the parties or either of them.

19. In the same decision it has been held that, a petition for return of gold ornaments and other cash paid at the time of marriage will also come within the jurisdiction of the family court, though one of the spouses is not alive at the time when the case was filed, relying on the decision reported in Abdul Jaleel's case, [2003(2) KLT 403 (SC)] it has been held that, the words dispute relating to the marriage and family affairs and for matters connected therewith must be given a broad construction and the statements of objects and the reasons would go to show that the jurisdiction of the family court extends inter alia in relation to property of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as spouses of other irrespective of the claim that the property is claimed during the subsistence of marriage or otherwise. It was probably because what was provided under section 7 explanation-c was not sufficient to bring all disputes arising out of marital relationship and there may be cases where either the husband or wife was not alive at the time of filing the suit that the legislature thought of adding clause d.

20. In the decision reported in Syamaladevi v. Saraladevi (2009 (1) KLT 892), it has been held that, section 7(a) and 7(b) and various clauses contained in explanation (a) to (g) of the Family Court Act cannot be restricted to disputes confining to the marriage either during the subsistence of the marriage or thereafter. Some disputes may even arise after either of them dies. That was a case filed by one of the parties to the marriage before the family court for declaration that they are the wife and son of deceased Bhaskara Pillai and they may be allowed to receive the family pension in respect of Bhaskara Pillai and injunction restraining authorities from disbursing the amount and in that case it was held that family court alone has got jurisdiction to consider that aspect.

21. In the decision reported in Krishnamma v. Viswajith (2009(4) KLT 840) it has been held that, suit for declaration as legal heir of her husband and partition of his estate by a widow, jurisdiction of civil court is not ousted as it is a lis with only one of the parties to the marriage on party array and section 7-c and d are not attracted. It has been observed in that decision that in view of section 7-c of Family Court Act, it is doubtless that to attract jurisdiction of family court, dispute must be between parties to marriage.

22. In the decision reported in Ammini v. Anees (2014(1) KLT 215), it has been held that, when the suit relates to property dispute between two women claiming to be wives of the deceased person, only family court got jurisdiction to consider that aspect.

23. In the decision reported in Balram Yadav v. Fulamaniya Yadav (AIR 2016 (SC) 2161) it has been held that, declaration regarding matrimonial status of any person has to be decided by the family court and not by a civil court. In that decision, it has been held that under section 7(1) explanation-b, a suit or

proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of family court, since section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case there is dispute on matrimonial status of any person, a declaration in that regard has to be sought only before family court, it makes no difference as to whether it is an affirmative relief or negative relief, what is imparted is the declaration regarding the matrimonial status. Section 20 also endorses the said view since the Family Court Act, 1984 has an overriding effect on other laws.

24. It is clear from the above dictum that, in a case where there is dispute regarding the legitimacy of marriage and declaration regarding the status of marriage of the parties to the marriage and claiming right on that basis, regarding the validity of the marriage etc., are matters to be considered by the family court. It is not necessary that in such cases it must be between the parties to the marriage alone, but such a relief can be claimed after one of the parties to the marriage died also. But if both these spouses are not there, then an action between relatives of the spouses need not be necessarily to be filed before family court, but it can be filed before the civil court in such cases, the jurisdiction of the civil court is not ousted. It is also clear from the dictum laid down above, that when there are other parties also entitled to get right in the property apart from the spouses as co-owners, then such a suit for partition of those properties, the jurisdiction of the civil court is not ousted.

25. In this case, admittedly the plaintiff is claiming the status of wife of deceased Reji K. Abraham and claims partition of the property belonging to the deceased spouse. The marital status of the plaintiff is disputed by the defendants. So the question as to whether the marriage between deceased Reji K. Abraham and the plaintiff was subsisting at the time of death of Reji K. Abraham is also incidentally requires to be considered and unless the status of the plaintiff as to whether she is the widow of Reji K. Abraham is incidentally decided, the relief claimed cannot be effectively adjudicated. Though the petitioner did not ask for a declaration of status as widow of deceased Reji K. Abraham, that question has to be incidentally decided for the purpose of granting the relief claimed in the suit, in view of explanation-b regarding the status of the parties of any person will include the status of the party to the marriage even after death of any one of the spouse and that person is claiming right through the spouse who died, in such cases, the jurisdiction of the family court is attracted. Further in respect of the property mentioned in explanation (b) & (c) also, such right can be claimed after the death of any one of the party also. Even in such cases, the living spouse can file a suit in respect of that property and such suit can be filed only before the family court in view of section 7(c) of the Family Court Act. So the impact of the dictum laid down in the decision reported in *Linish P. Mathew v. Mruthula Mathew* (2012(3) KLT 428) to the facts of this case has to be considered by the court on the basis of evidence on a later occasion. So at this stage there is no cause of action for the plaintiff to file the suit so as to reject the suit outrightly under

Order 7, Rule 11 of the Code of Civil Procedure as it is a matter to be considered on the basis of evidence.

26. But in Krishnamma's case, (2009(4) KLT 840), the decision of the division bench in Suprabha v. Sivaraman (2006(1) KLT 712) and Syamaladevi v. Saraladevi (2009(1) KLT 892) were not considered by this court. Further in the subsequent decision reported in Ammini v. Anees (2014(1) KLT 215), this court has held that, if there is a dispute relates to the property belonged to the deceased, claim between two persons claiming to be the wives of the deceased person, only family court has got jurisdiction to decide that question as to who is the wife of that person. So under such circumstances, this will fall under explanation (b) and (c) of section 7 of Family Courts Act attracting the jurisdiction of family court and ousting the jurisdiction of civil court by virtue of section 8 of Family Court Act. So the finding of the court below on the preliminary issue that civil court has got jurisdiction and the suit is maintainable before the civil court is unsustainable in law and the same is liable to be set aside and a direction has to be given to the sub court to transfer the case to family court under section 8 of the Family Court Act, instead of returning the plaint to be presented before the family court in order to avoid delay in proceeding with the case. So the revision is allowed and the finding of the court below on the preliminary issue that civil court has got jurisdiction to entertain the suit is set aside and hold that civil court has no jurisdiction and family court alone has got jurisdiction to entertain the same. The sub Judge, Muvattupuzha is directed to transfer the suit O.S. 85/2012 pending before that court to Family Court, Muvattupuzha or family court having jurisdiction to entertain the suit as provided under section 8 of the Family Court Act immediately on getting receipt of this order.

27. With the above observation the revision petition is allowed and disposed of.

28. Registry is directed to communicate this order to the sub court, Muvattupuzha, immediately.