

(1985) 05 KL CK 0001
In the High Court Of Kerala
Case No : S.A. No. 1064 of 1979

Komancheri Madhavan Nair and Another	APPELLANT
Vs	
K. Ravunni Nair and Others	RESPONDENT

Date of Decision : 31-05-1985

Acts Referred:

Citation : (1985) KLJ 608

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : P.N.K. Achan, K. Vijayan, N.N. Sugunapalan and N. Nandakumara Menon, for the Appellant; V. Parameswara Menon, R.D. Shenoi and Peter Tharakan, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Paripoornan, J.—Defendants 2 to 6, legal representatives of the 1st defendant in O.S. No. 43 of 1972, Sub Court, Kozhikode, are the appellants. Plaintiffs 2 and 3 and the legal representatives of the 1st plaintiff are the respondents Pending the appeal, plaintiffs 2 and 3 died and their legal representatives have been impleaded as additional respondents. The suit was one for partition. It was dismissed by the trial court, but allowed by the lower appellate court with regard to items 1, 2, 3, and 6 of the plaint schedule properties. The plaintiffs were held entitled to 5 shares out of 16 shares. At the threshold, the controversy between the parties covered a wide range. At the second appellate stage, the controversy between the parties has considerably narrowed down and it centres round the interpretation of a Will, Ext. B1 dated 22-9-1918, The minimal facts necessary to appreciate the controversy is as follows:

One Chathu Nair and Ravunni Nair were brothers. Ittiatha Amma was their sister. The 1st defendant is the daughter of Ittiatha Amma. Plaintiffs 1 to 3, brothers, as also the 1st defendant Kalliani Amma, are the children of Ittiatha Amma. The brothers, Ravunni Nair and Chathu Nair, executed, Ext. B1 will dated 22-9-1918.

Ravunni Nair died on 23-9-1918. According to the plaintiffs, on the demise of Ravunni Nair, one half of the properties belonging to him will devolve on Ittiatha Amma, plaintiffs 1 to 3 and defendants 1 and her children, defendants 3, 4 and 5. So, in the plaint properties, half interest, belonging to Ravunni Nair devolved on 8 persons-Ittiatha - Amma, plaintiffs 1 to 3, defendants 1, 3, 4 and 5. Each one of them will get 1/16 shares of the plaint schedule properties. Plaintiffs 1 to 3 will get 3/16 shares. According to the plaintiffs, Ext. B1 is a joint will. The property belonging to Ravunni Nair will vest as per the terms of the will in Ittiatha Amma and her children-plaintiffs 1 to 3 and defendants 1,3,4 and 5. According to the 1st defendant, Ext. B1 is a joint and mutual will. On the demise of Ravunni Nair the entirety of the property will devolve on the other testator, Chathu Nair. Chathu Nair had also executed a sale-deed in favour of the 1st defendant for certain properties. Chathu Nair died in 1952 On that day, Ittiatha Amma was not alive. So, the rights in the properties devolved on the 1st defendant and her female children alone. The plaintiffs have no right in the suit properties. Even if they have got any right, it is barred by limitation and adverse possession. Some of the items are not partible. They are not available for partition.

2. The trial court found that Ext. B1 Will is a joint and mutual Will and so the plaintiffs have no right over the plaint schedule properties. It was further held that if at all there was any right for the plaintiffs, it is also barred by limitation and adverse possession. The suit was dismissed.

3. In appeal, the learned District Judge held that items 12 to 16 of plaint schedule properties are not available for partition. It was also held that items 4 and 5 are also not available for partition. The appellants/plaintiffs conceded before the lower appellate court that they are not laying any claim for items 7 to 11 also So, the lower appellate court was concerned only with regard to plaint items 1, 2,3 and 6. The questions that arose for consideration were two fold. (1) Whether the plaintiffs derived any title in respect of the said 4 items of properties as per Ext. B 1 will? (2) Even if the plaintiffs had any right, whether those rights were barred by limitation and adverse possession ? On a reading of Ext. B1 will, the learned District Judge held that Ext. B1 did not create any absolute right in favour of the other testator, Chathu Nair, on the demise of Ravunni Nair. The recitals are clear to show that rights were created in favour of the legatees, but the right of enjoyment of the properties was postponed till the death of both the testators. So, on the death of Ravunni Nair, Ittiathamma and the 1st defendant became entitled to the rights of Ravunni Nair and that right was vested in them subject to the restrictions that the enjoyment of the property was postponed till the death of Chathu Nair. The rights obtained by Ittiatha Amma and the 1st defendant would devolve on their death on their legal heirs. Thus, on her death Ittiatha Amma's rights devolved on the 1st defendant and the three plaintiffs, her children. What Ittiatha Amma got was the half right of Ravunni Nair along with the 1st defendant. So, the plaintiffs are entitled to 3/16 shares in the plaint schedule items. On point No. 2, the learned District Judge held that there is no

material to show that there was any hostile animus on the part of the 1st defendant as against the plaintiffs to exclusively possess the said items of properties. In a case between co-owners there is a very heavy burden cast on the co-owner who sets up adverse possession against the other co-owners. It found that the burden is not at all discharged in this case. It was found that the plaintiffs' right did not become barred by adverse possession. In this view of the matter a preliminary decree for partition was passed and it was held that items No. 1,2,3 and 6 of the plaint schedule will be partitioned into 16 equal shares by metes and bounds and three such shares will be allotted to the plaintiffs. The plaintiffs are not entitled to past mesne profits, but the plaintiffs are entitled to future mesne profits from the date of the decree, the quantum of which will be determined in the final decree proceedings. The defendants have come up in Second Appeal. The plaintiffs have filed a Cross-appeal.

4. The questions of law formulated at the time of admission of the Second Appeal as substantial question of law arising for consideration in the appeal, are as follows;

(a) Whether Exhibit B1 is not a joint and mutual will?

(b) Whether in the case of a joint and mutual will of the nature of Exhibit B1, there is a vesting of the property on the death of one of the testators. Is not the bequest postponed till the time of the death of the surviving legatee?

(c) Does the presumption relating to the possession of a co-owner attach itself to items 1 to 3 of the plaint A schedule which were sold away to the first defendant in the years 1922 and 1923 at a time when she had not become a legatee?

(d) Do the facts and circumstances in the case establish a hostile animous sufficient to oust plaintiffs as found by the trial court?

(e) Whether the omission of the court below to notice the tenants' rights of the first defendant and to decide on it is illegal and unsustainable in law?

5. Counsel for the appellants, Mr. Achan, argued that on a fair interpretation of Ext.B1, it should be held that it is a joint and mutual will. If so, on Ravunni Nair's death the entire property will devolve on the other testator, Chathu Nair. On Chathu Nair's death, the property will devolve on the 1st defendant only, since Ittiatha Amma was not alive on that day. It was also argued that even if the plaintiffs had any right as contended by them, it is barred by limitation and adverse possession. I am unable to accept the above contentions.

6. The preamble, as well as paragraphs 2 and 3 of Ext.B1 are as follow

On a fair and reasonable reading of Ext. B1 it will show that Ext. B1 is only a joint will. The legatees, Ittiatha Amma and the 1st defendant will be entitled to the rights of Ravunni Nair and that right vested in them subject to the restriction that the enjoyment of the property was postponed till the death of Chathu Nair. In *Kochu Govindan Kaimal v. Lakshmi Amma* (1959 KLT (SC) 9) the Supreme

Court has laid down the law as to what is a joint will and what is a mutual will. Ext.B1 is a will made by two testators contained in a single document. In the light of the decision of the Supreme Court Ext.B1 should be construed as a will executed by each testator disposing of his separate property or joint property. A mutual will is one when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. I am of the view that

Ext.B1 does not satisfy the above requirements. So, it is not a mutual will. On the other hand, the legatees in Ext.B1 are distinct from the testators. Ext 51 is not a mutual will.

7. I concur with the reasoning and finding of the lower appellate court that on the demise of Ravunni Nair, Ittiatha Amma and the 1st defendant became entitled to the rights of Ravunni Nair. though the enjoyment of the property was postponed till the death of Chathu Nair. On these premises, it follows that Ittiatha Amma's right on her death devolved on the 1st defendant and the three plaintiffs, her children. The plaintiffs are entitled to 3/16 shares in the plaint schedule items.

8. Regarding the second point, the lower appellate court, in paragraphs 13 and 14 of the Judgment, has exhaustively dealt with the matter and found that the plaintiffs' rights have not become barred by adverse possession. The said finding of fact, is based on ample and proper material I see no reason to differ. It should be remembered that the plaintiffs are really co-owners. The 1st defendant, who is a co-owner, is really a trustee of the properties. From that angle, if the question of adverse possession is viewed, it is unarguable that the rights of the plaintiffs are barred by adverse possession. In agreement with the lower appellate court. I hold that the plaintiffs' rights are not barred by adverse possession. No other point was argued by appellants' counsel, Mr. Achan.

9. Now I shall consider the cross-objections. Counsel for the respondents, Mr. Parameswara Menon, pressed only one point Counsel contended that the court below was not justified in negating the past mesne profits. No reason has been alleged or given in negating the said relief. There is force in this submission. If the plaintiffs are entitled to 3/16 shares in the plaint schedule items, there is no reason to negative the past mesne profits. I hold that the plaintiffs are entitled to past mesne profits, the quantum of which will be determined in the final decree proceedings. In the result, the Second Appeal is dismissed. The Cross-objection is allowed to the limited extent of awarding part mesne profits with regard to the shares allotted to the plaintiffs, as prayed for in the plaint. There shall be no order as to costs.