

(2010) 11 KL CK 0127

In the High Court Of Kerala

Case No : Regular First Appeal No. 229 of 2005

K.T. Easy, Koimaparambil House and K.T. Varghese

APPELLANT

Vs

Mary Thomas Alias Kunjamma and Another

RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Citation : (2010) 11 KL CK 0127

Hon'ble Judges : Thottathil B. Radhakrishnan, J;P. Bhavadasan, J

Bench : Division Bench

Advocate : P. Santhalingam, for the Appellant; Babu Karukapadath, for the Respondent

Final Decision : Dismissed

Judgement

Thottathil B Radhakrishnan, J.—The unserved Respondents 6, 9 and 10 are among those Defendants who did not contest the suit for partition. The Appellants, Defendants 1 and 2, set up exclusive title to the property, including by adverse possession and ouster. They, in fact, set up a case that the Plaintiffs who are females have been paid off their share at the time of marriage. With this, we do not deem it necessary to wait for the appearance of the unserved Respondents 6, 9 and 10. We dispense with notice to those Respondents. The appeal is treated as ripe.

2. Heard.

3. Thanchu Vaidyan allegedly died intestate in 1973, leaving behind seven daughters and three sons, of whom, one was a 2 priest. He is also no more. Plaintiffs are the daughters of Thanchu Vaidyan. Defendants 1 and 2 are his sons. The other Defendants have also some interest as sharers in Thanchu Vaidyan's estate. The suit was resisted only by Defendants 1 and 2, sons of Thanchu Vaidyan. The relationship between the parties, the paternity and the title are not in dispute. Defendants 1 and 2 set up a case that the Plaintiffs were given ornaments and were paid certain amounts at the time of their marriage in lieu of

their shares. They set up a case of adverse possession and ouster overruling the defence of Defendants 1 and 2 and based on a preliminary decree for partition.

4. Before us, the only question that arises for decision is as to whether the court below erred in law or on facts in holding that Defendants 1 and 2 have no title by adverse possession or ouster. Needless to say the law is well settled that a pleading of ouster has to be substantiated by evidence and title by prescription to the exclusion of the other sharers. The first Defendant alone went to the box. His testimony and the documentary evidence tendered by the Defendants do not inspire confidence to hold that there was any intention at any point of time to exclude the other sharers from their right to share in the property. As can be seen, the fundamental stand taken by Defendants 1 and 2 refer to a situation where Christian women are not eligible to share in the estate of the parents. Following the decision of the Apex Court in *MaryRoy*, as rightly found by the court below, such a plea does not arise. Equally, with the fact that the parties were labouring on a wrong proposition of law, the plea of adverse possession ouster and limitation as set up by Defendants 1 and 2 has also to necessarily fail.

5. In the result, the appeal is dismissed confirming the impugned preliminary decree.

Taking into consideration the totality of the facts and circumstances, we deem it appropriate that the court below makes an endeavour in the final decree proceedings to have the residential building among the suit properties to be allotted to Defendants 1 and 2 jointly, provided such an adjustment is possible by necessary adjustments on equitable considerations. It is so ordered. The parties are directed to suffer their respective costs.