
(1993) 09 KL CK 0009
In the High Court Of Kerala
Case No : A.S. No. 109/92

Parangodan @ Thankan

APPELLANT

Vs

Lekshmikutty and others

RESPONDENT

Date of Decision : 28-09-1993

Acts Referred:

Kerala Education Act, 1958 — Section 6, 6(1)
Partition Act, 1893 — Section 2, 3

Citation : (1993) 2 KLJ 855

Hon'ble Judges : Varghese Kalliath, J;K.J. Joseph, J

Bench : Division Bench

Advocate : G. Janardana Kurup and John K. George, for the Appellant; N. Viswanatha Iyer For 1st Respondent, for the Respondent

Final Decision : Dismissed

Judgement

K.J. Joseph, J.—The above appeal arises from the judgment and decree in O. S. No. 33/88 on the file of the Subordinate Judge's Court, Ottapalam, Eleventh defendant is the appellant herein. The suit is for partition by the 1st respondent in this appeal who is the daughter of the deceased Kuttiraman, claiming 13/22 share in the property of the said Kuttiraman. Kuttiraman died on 8-12-1983. Plaintiff and defendants 2 to 6 are the children of Kuttiraman in the first wife the first defendant. Defendants 8 to 10 are the children of Kuttiraman in the second wife, the 7th defendant in the case. After the filing of the suit, the 5th defendant died and his legal representatives are impleaded as supplemental defendants 14 to 17 as per order in I. A. No. 909/89.

2. According to the plaintiff, plaint A schedule property with, the school building therein and the B schedule movables in the school belong to the first defendant and her husband Kuttiraman equally as per Ext. A1 document No. 583/1961. On the death of Kuttiraman, his half share in the properties devolved upon the plaintiff and the defendants. The remaining half share of the first defendant was assigned to the plaintiff as per Ext. A2 settlement deed 210/87 of the Sub

Registry Office, Ottapalam. Therefore, the plaintiff claims 13/22 share in the property of the deceased Kuttiraman. According to her, till the death of Kuttiraman, he was the manager of the school. He was completely laid up for about 2 years prior to his death due to paralysis and plaintiff alleges that he was not having any memory power and he was under treatment. The plaintiff also alleges that Kuttiraman was staying with defendants 1, 5 and 6 and when his health condition became very bad, defendants 7 and 8 took him to their house. According to the plaintiff, at that time certain documents were created at the instance of 8th and 11th defendant nominating the 11th defendant who is the wife of the 8th defendant, appointing her as manager of the school. Thereafter, the management of the school is being conducted by the 11th defendant and her husband 8th defendant. The 11th defendant has no right in the school is the allegation in the plaint. Even though, in the plaint, the extent of plaint A schedule property is shown as 1.75 acres of land and the school therein the plaint was subsequently amended as per I. A. No. 1020/91 wherein, the plaintiff has contended that the actual extent within the 4 boundaries of plaint A schedule property is 2 acres 46 cents excluding the 8 cents surrendered for the road.

3. The first defendant filed a written statement stating that she has assigned her right in the property to the plaintiff as per Ext. A2 document No. 210/87 and after the death of Kuttiraman, his half right devolved upon the first defendant, the plaintiff and defendants 2 to 10. As stated earlier, the 5th defendant died and his legal representatives are impleaded as defendants 14 to 17.

4. The 8th defendant has filed a separate written statement and according to him, after the death of Kuttiraman on 8-12-1983, his right in the plaint schedule property and the management of the school devolved upon the 11th defendant as per Registered Will No. 89/3 of 1983 executed by his father, Kuttiraman. He has also contended that the Educational Authorities have approved the appointment of 11th defendant as manager of the school, He has totally denied the statement that the condition of Kuttiraman was serious at the time when he was removed to his house as wrongly alleged by the Plaintiff. He further contends that Kuttiraman executed the will in favour of the 11th defendant with an intention to transfer his entire rights to her. He also contends that the plaintiff is collecting the rent of the building No. 6/296 in plaint A schedule property after the death of Kuttiraman and hence prayed for a direction to the plaintiff to account for the rent collected by her and the future rent.

5. The 11th defendant has filed a separate written statement. According to her, as per Ext. B4 registered will dated 9-8-1983 of the Sub Registry Office, Ottapalam, the entire right of Kuttiraman in the property devolved upon her on the death of Kuttiraman. Even during the life time of Kuttiraman, he had applied for transfer of the management of the school in her name and after the death of Kuttiraman, the department has approved the transfer of the personnel of the manager in her favour and ever since that date, she is functioning as the manager of the school. She also denies the statement that Kuttiraman has lost

his memory 2 years prior to his death and the will has been executed by Kuttiraman with full consciousness and intention and he was having disposing state of mind at the time of execution of the will. She has also denied the statement in the plaint that the income from the property is Rs. 4,364/-. She has further stated that she has spent an amount of Rs. 8,000/- for the school after taking over the management of the same and this amount she is entitled to get from the estate of the deceased Kuttiraman.

6. The 13th defendant in the suit is the Assistant Educational Officer Ottapalam. He has also filed a written statement in the case. According to him, the actual extent occupied by the school is 2.42 acres and as per the provisions of the Kerala Education Act and the Rules, the school should have a minimum extent of 2 acres and therefore, he has stated that by division, of the school, the extent is likely to be reduced below the statutory limit and hence he has contended that plaint A schedule property is not liable to be divided.

7. After the filing of the written statement by 8th and 11th defendants, the plaintiff filed a replication wherein she has disputed the genuineness of Ext. B4 will and according to her, the will itself is a forgery. She also denies the signature of Kuttiraman in the will. According to her, Kuttiraman was suffering from paralysis and he has no testamentary capacity to execute Ext. B4 will. She also alleges that if any will is executed, the same is as a result of undue influence exerted by the appellant - the 11th defendant and her husband the 8th defendant on Kuttiraman and hence the will is illegal and void. On the basis of the above pleadings, the court below framed the following issues:

1. What are the properties available for partition?
2. Whether the plaintiff is entitled to get any mesne profits?
3. Whether the plaintiff is entitled for relief of partition.
4. Relief and costs.

8. On the side of the plaintiff, apart from her evidence as PW 3, 2 witnesses also are examined viz. 2 doctors who treated Kuttiraman for his illness and she has produced 3 documents including Ext. A1 assignment deed dated 12-4-1961 in favour of deceased Kuttiraman and his first wife the first defendant in the suit, who is the mother of the plaintiff. She has also produced Ext. A2 settlement dated 17-1-1987 executed by the first defendant in her favour. On the side of the contesting defendants, the appellant is examined as DW1 and the Sub Registrar, who had registered Ext. B4 will as DW2. One of the 2 attesting witnesses in the will viz Velayudhan Nair is examined as DW3 and DW4 is the identifying witness, who has identified Kuttiraman before the Sub Registrar. Apart from Ext. B4 will, the appellant has produced Ext. B2 order passed by the 13th defendant, the Assistant Educational Officer, approving the change of the personal of the manager in her favour.

9. After a detailed consideration of the evidence adduced in the case, the learned

trial Judge, on issue no. 1 found that Ext. B4 will is genuine and valid. He has also found that Kuttiraman has testamentary capacity and disposing state of mind at the time of execution of the will. On issue nos. 2 and 3, the trial court found that Ext. A2 transfer is not a transfer of the property of the school and the said transfer is not void u/s 6 of the Kerala Education Act. The learned judge also found that the said transfer is only a transfer of the half right of the first defendant in the school and its properties and hence plaintiff is entitled to get a decree for partition of the properties of the deceased Kuttiraman. On the strength of the above evidence, the trial judge found that the plaintiff is entitled for half the right of the first defendant and the 11th defendant/appellant herein is entitled to half the right of the deceased Kuttiraman. The learned judge also directed to divide the properties into 2 equal shares. There is a further direction by the learned trial Judge that since the property involved in the suit is a school, it cannot be divided by metes and bounds and hence he has directed to effect the partition of the property by sale of the same in court between the plaintiff and the 11th defendant and the property shall be set apart to the share of the highest bidder in the final decree proceedings. The trial court also directed that the sale shall be inclusive of the right of the management of the school and the 13th defendant, Assistant Educational Officer, shall be held to be liable to approve the transfer of the management of the school in favour of the successful bidder. The 11th defendant comes up with the present appeal against the said judgment and decree. The plaintiff has filed a cross objection against the finding of the trial court regarding the genuineness of the will and prays for setting aside the said finding and allow the suit as prayed for, allotting 13/22 share in the property of the deceased Kuttiraman in her favour.

10. The learned counsel appearing on behalf of the appellant has strenuously argued before us that the finding of the trial court that since the property is a school property and the same cannot be divided by metes and bounds is clearly illegal and wrong. According to the appellant, the trial court ought to have framed an issue as to whether the right of management of the school is partible or whether it is an exclusive property of Kuttiraman which devolved upon the appellant. Learned counsel also submitted that division of school properties is not in any way against the spirit of Section 6 of the Kerala Education Act as wrongly found by the trial court. He has further submitted that the direction of the trial court to effect the partition of the property by sale of the same in court between the plaintiff and the 11th defendant also is clearly illegal and unjust. The appellant also has a case that the trial court ought to have considered the contentions raised by the appellant that she effected improvements in the school building to the tune of Rs. 8,000/-, but the same was not considered by the trial court. The plaintiff also did not account for the rent collected from the shop rooms in the plaint schedule property and the court below did not enter into any finding on the above matter also. Hence the learned counsel prays for setting aside the above finding of the trial court and effect the partition as prayed for in her written statement by metes and bounds

11. The learned counsel appearing on behalf of the respondents 1 and 2 viz. the plaintiff and the first defendant in the suit contents that Ext. B4 is not genuine and Kuttiraman was removed to the house of the 8th defendant only 6 months prior to the date of his death for better treatment and he was not having any disposing state of mind at the time when Ext. B4 will is alleged to have been executed by the deceased Kuttiraman. He has also argued before us that Kuttiraman was completely paralysed for 2 years prior to his death and was unable even to move about during his last days. He has no mental capacity to execute any will. According to him, there is no proper execution of the will by the deceased Kuttiraman and attestation of the same by the witnesses as contemplated under law. Learned counsel also submits that the deceased Kuttiraman has only half share in Ext. A1 property and the educational agency of the school vests with first defendant along with Kuttiraman and Kuttiraman was only a manager of the school and he has no absolute right to appoint the appellant as the manager of the school without the consent of the first defendant who is the co-owner of Ext. A1 property and the educational agency of the school along with deceased Kuttiraman. Hence learned counsel submits that the finding on issue No. 1 by the court below, be set aside and the suit may be decreed as prayed for in the plaint.

12. Admittedly, the school and the school property are purchased by Kuttiraman and his first wife, the first defendant as per Ext. A1 document. They are co-owners in respect of that property. As per Ext. A2 settlement deed, the right of the first defendant in that property is given to the plaintiff. There is no dispute about that aspect of the matter. The deceased Kuttiraman has only half share in Ext. A1 property.

The fact that Kuttiraman was functioning as manager of the school till the date of death or the further fact that during the life time of Kuttiraman, he had applied for transfer of change in the personal of the manager on 4-8-1983 in favour of the appellant herein viz. 11th defendant and the same was allowed by the 13th defendant, Assistant Educational Officer as per Ext. B2 order dated 26-5-1984 will not affect the half share of the first defendant in respect of Ext. A1 properties and the school established in the said property. The case of the plaintiff that Ext. B4 will is not genuine and at the time of execution, Kuttiraman has no disposing state of mind and whether the will executed by Kuttiraman is as a result of undue influence exercised by the appellant and her husband 8th defendant on Kuttiraman etc. are duly and properly considered by the trial court. The evidence of 2 doctors examined by the plaintiff as PWs 1 & 2 will not prove that Kuttiraman did not have the disposing state of mind when Ext. B4 will was executed or registered on 10-8-1983 at the residence of the 8th defendant. On the other hand, the documentary evidence, Ext. X3 admission register kept in the hospital will show that he was cured and discharged from the hospital after his illness. The evidence of DW2, Sub Registrar, who registered the will from the residence of 8th defendant is that the deceased Kuttiraman was introduced to him by DW4, Appukuttan Nair who personally knows Kuttiraman very well for

more than 40 years and admitted before him that Kuttiraman has executed the will. DW2 has also given evidence that Kuttiraman himself has presented the document for registration before him. The Sub Registrar further gave evidence that he was convinced and satisfied that the execution of the will is by Kuttiraman, even though he was laid up due to some illness at the time of registration of the will. The will is duly attested by two witnesses viz. Achuthan Nair who is dead at the time of filing the suit and Velayudhan Nair, DW 3 who have evidence regarding the due execution and attestation of Ext. B4 will. He has stated that both himself and the deceased Achuthan Nair have signed Ext. B4 will as attesting witnesses after Kuttiraman has put his signature in the will and both of them have seen Kuttiraman signing Ext. B4 will. It has also come out in evidence that during his lifetime itself, Kuttiraman has informed the 13th defendant Assistant Educational Officer as per his letter dated 22-9-1983 about the execution of the will in favour of the appellant when the first defendant has objected to the transfer of appointment of the appellant as manager of the school. All these relevant facts were duly considered by the trial court and found against the plaintiff. The above findings are proper and based on relevant materials. The further case of the plaintiff that the appellant and her husband, 8th defendant have brought another person as Kuttiraman before the Sub Registrar and got Ext. B4 will registered by DW2 is also found against the plaintiff, correctly in our view, by the trial court. In the light of the evidence of DW2 to 4 and based on various communications exchanged between the deceased Kuttiraman and the Educational Department regarding the change of manager of the school, evidenced by Ext. B1 file, the court below found the validity of the will in favour of the appellant.

13. Based on the evidence adduced in the case especially in the light of the evidence of PWs 1 and 2, the trial court also came to the conclusion that the deceased Kuttiraman has disposing state of mind when he executed the will and will is genuine. The execution and attestation of the will also are proved properly. We see no ground or justification to come to a different conclusion to find that the will is not genuine. The above finding of the trial court is perfectly valid and justified in the light of the evidence adduced in the case. We see no sufficient grounds to set aside the above finding arrived at by the trial court.

13. In the light of the above finding regarding the genuineness of the will and on the strength of the will, appellant is entitled to get half share in the property of the deceased Kuttiraman as rightly found by the trial court. The learned counsel also attacks the finding of the lower court that the school property cannot be divided by metes and bounds, since according to the lower court, such a division is against the spirit of Section 6 of Kerala Education Act. The appellant also has a grievance in the direction issued by the trial court to effect partition by sale of the properties in court between the plaintiff and appellant. The learned counsel placing reliance on the decision reported in *Anthony Animal v. Antony* 1983 KLT 645 and submitted that the court has ample power to effect the partition under Sections 2 and 3 of the Partition Act, 1893. As per Section 2 of the Partition Act,

1893, a sale of the properties involved in a partition suit and distribution of the sale proceeds among the sharers can be made only on the request of a shareholder individually interested or of shareholders collectively interested in one moiety or upwards of the properties involved. But, it cannot be said that the Court has no power to direct the sale of the property involved in a suit for partition and the distribution of the sale proceeds among the sharers even if the above condition insisted by Section 2 of the Partition Act is not satisfied. What the court has to see is that these is a just partition. In all cases where the property, or properties, is incapable of partition by metes and bounds, the court is not without powers to resort to a feasible method just and equitable in the circumstances of the case. The Partition Act does not take away this power the court has.

15. In the decision reported in *Mazoli Balan v. Moroli Danu and others* 1986 KLT 919 it has been held that Section 6 (1) of the Kerala Education Act restricts only alienation of the property of the aided school, and the alienation may be by way of sale, mortgage, pledge, charge or transfer of possession. It is settled law that a partition of a family property is not an alienation or a transfer in the strict sense of the above expression in Section 6 of the Kerala Education Act. Again this court in the decision reported in *Kesava Kurup v. State of Kerala and Others* 1987 (2 KLT 801, which is affirmed in *Kesava Kurup v. State of Kerala* 1988 (1) KLT 77 that Section 6 of the Kerala Education Act is not applicable when there is no transfer of property. As there is no transfer of property, the partition of the school will not fall within the mischief of the Section 6 of the Kerala Education Act. Therefore the finding of the lower court that the school property cannot be divided into by metes and bounds as it is against the spirit of Section 6 of the Act is not entirely correct. But the evidence in the case is that the entire property where the school situates is treated as school properties during all these years and as contended by the 13th defendant. Assistant Educational Officer in his written statement has said that as per the Kerala Education Act and the Rules, a school should have a minimum extent of 2 acres and by division of the school, the extent is likely to be reduced below the statutory limit and hence he has submitted that the property may not be divided.

16. Since there is no other property liable to be partitioned and included in the plaint schedule, partition of the said property between the parties in equal shares by metes and bounds will definitely stand in the way for a proper conduct of the school. In the above context, we see sufficient force and relevance in the contention raised by the 13th defendant in the case referred to above. In the above circumstances, we feel that the direction given by the trial court to effect the partition of the property by sale of the same in court, inclusive of the right of management of the school, between the plaintiff and the 11th defendant, the appellant herein, and the property shall be set apart to the share of the highest bidder in the final decree application is perfectly justified and does not call for any interference in this appeal. We see no merit in the appeal and the cross objection.

17. In the light of the above finding, we see no merit in the submission made by the appellant that the trial court did not frame necessary issue regarding the question whether the right of the management of the school is partable or not or whether it is an exclusive property of Kuttiraman devolved upon the appellant. So also there is no reliable evidence to substantiate her contentions that she has spent an amount of Rs. 8,000/- for the improvement of the school and the plaintiff is getting any rent from the tenants in occupation of some shop rooms in the plaint schedule property. We see no merits in the above submission made by the learned counsel for the appellant. This court in C. M. P. No. 4291/92 dated 22-6-1992 has ordered that no fresh appointment of teachers in the school shall be made without obtaining previous sanction from this court. Now, we have disposed of this appeal and for completing the final decree proceedings, normally it may take sometime before the court below. Under such circumstances, we feel that for the proper conduct of the school, the appellant, whose appointment as manager of the school is approved as per Ext. B2 order, shall be allowed to continue to function as manager of the school till a final decree is passed in the suit. But any appointment of teaching and non-teaching staff in the school by the appellant shall be made only after obtaining previous sanction from the trial court.

Subject to the above direction, the appeal and cross objection are dismissed. The parties are directed to suffer their costs.