

(2000) 10 KL CK 0048

In the High Court Of Kerala

Case No : S.A. No's. 958 of 1989 (E) , 327 and 469 of 1992 (E) and 223 of 1994 (B)

Puthiyadath Jayamathy Avva and Others

APPELLANT

Vs

K.J. Naga Kumar and Others

RESPONDENT

Date of Decision : 05-10-2000

Acts Referred:

Constitution of India, 1950 — Article 200, 254
Hindu Succession Act, 1956 — Section 4, 6, 8
Kerala Joint Hindu Family System (Abolition) Act, 1975 — Section 1

Citation : AIR 2001 Ker 38

Hon'ble Judges : D. Sreedevi, J

Bench : Single Bench

Advocate : P.V. Jyothi Prasad and Sebastian Davis, for the Appellant; V.V. Surendran, P.M. Padmanabhan and T.G. Rajendran, for the Respondent

Final Decision : Dismissed

Judgement

D. Sreedevi, J.—This Second Appeal is directed against the decree and judgment in A. S. 61/1990 of the Subordinate Judge, Sulthan Bathery, which was filed against the judgment and decree in O. S. 65/1988 of the Munsiffs Court, Kalpetta.

2. The appellants are defendants 1 and 3 to 6 and the respondents are the plaintiffs and 2nd defendant.

3. The facts for the purpose of this appeal are as follows : The plaintiffs, who are respondents 1 and 2 herein, filed the above suit for partition. The plaintiffs are the children of deceased. Jinachandra Gowder through his first wife and defendants 2 to 6 are the children through his second wife, who is the first defendant. Item No, 1 of the plaint schedule property was allotted to Jinachandra Gowder as per registered partition deed executed on 20-1-1958. Item Nos. 2 and 3 were purchased by Jinachandra Gowder utilising the Income derived from item No. 1. Item Nos. 4 and 5 were excluded from the partition deed of the year 1958. Thus, the entire plaint schedule properties jointly belong to the plaintiffs

and the defendants after the death of Jinachandra Gowder. The parties are governed by Hindu Mitakshara Law. On the allegation that after the death of Jinachandra Gowder the defendants are taking income, the plaintiffs filed the above suit for partition and recovery of possession with mesne profits. It is also alleged in the plaint that the defendants had already sold timber worth Rs. 26,000/- from the plaint schedule property. So, they claimed 2/16 share over the plaint schedule property and also over the money obtained by sale of the timber. Jinachandra Gowder had deposited Rs. 13,870/- at Varadoor Cooperative Bank. The plaintiffs also claim share over the said money.

4. Defendants 1 to 3 filed written statement. They would contend that as per the registered partition deed of 1958, the plaintiffs and the second defendant had taken their share from the joint family property and virtually they were separated from the joint family. At the time of partition, there were only four male members, including Jinachandra Gowder. As per the partition deed, the members got themselves separated and hence the property allotted to the share of Jinachandra Gowder has become his separate property and thereafter 5th defendant was born to Jinachandra Gowder through his second wife and thereby another joint family has come into existence. Item Nos. 4 and 5 were set apart to the share of the second defendant and the same was gifted to the 5th defendant. The plaint schedule items 1, 4 and 5 were managed by deceased Jinachandra Gowder. According to the defendants, since the plaintiffs and second defendant were separated from the joint family, they are not entitled to get any share as prayed for in the plaint. The allegation that Jinachandra Gowder had exclusive right for half share over the plaint schedule property is not correct. After the death of Jinachandra Gowder, the first defendant and her children are entitled to his share as per Section 6 of the Hindu Succession Act, hereinafter referred as "Act XXX of 1956". They also denied the allegation that the timber from the property was sold for a consideration of Rs. 26,000/-. Even the deposit alleged in the plaint is also not correct,

5. The trial Court framed six issues and examined P. W. 1 and D. W. 1 and marked Exhibits A1 to A3 and decreed the suit by a preliminary decree for partition. It was decreed that the scheduled properties shall be divided into 16 shares and 2/16 shares shall be allotted to the plaintiffs jointly. They were also allowed to realise mesne profits for the last four years prior to the date of suit and also for future mesne profits that will be decided in the final decree proceedings. Aggrieved by the said decree and judgment, the defendants 1 and 3 to 6 filed A. S. 61/1990 before the Sub Court, Sulthan Bathery. The learned Sub Judge dismissed the appeal, upholding the preliminary decree passed by the trial Court. Hence, the Second Appeal by defendants 1 and 3 to 6.

6. Heard both sides.

7. Mr, Jyothi Prasad, the learned Counsel appearing for the appellants challenged the decree and judgment on various grounds. According to him, the Court below ought to have held that the Act XXX of 1956 (Central Act) shall prevail over the

Kerala Joint Hindu Family System (Abolition) Act, 1976, hereinafter referred to as "Act XXX of 1976" (State Act) when the provision of the State enactment is repugnant thereto and that the later provision is void under Article 254(1) of the Constitution of India. It is also submitted that the lower Court erred in holding that Section 8 and not Section 6 of Act XXX of 1956 apply to properties retained by father overlooking the direct express provision in para 1 of Section 6 of the Act XXX of 1956.

8. The questions of law that arise for consideration in this case are the following :--

(i) Whether the State enactment, Act XXX of 1976, can override the Central enactment, Act XXX of 1956.

(ii) Whether the Act XXX of 1976 can override Section 6 of Act XXX of 1956 under the provisions of Article 254(1) of the Constitution of India.

(iii) Whether a Hindu converted into Muslim can claim any right under Central Act XXX of 1956 or Kerala Act XXX of 1976.

(iv) Whether the disrupted members can claim a right over the property of one of the disrupted members after his disruption as it has become joint family property by birth of a male member

9. Admittedly, the plaint schedule items 1, 4 and 5 originally belonged to the joint family of Jinachandra Gowder. He had two wives. Plaintiffs 1 and 2 are the children through his first wife, who is now no more, First defendant is his second wife. Defendants 2 to 6 are his children through the second wife. Jinachandra Gowder passed away on 20-4-1984. While they were holding the property as coparceners in a joint family property, they entered into a partition in the year 1958. At that time, there were only four male members. Item No. 1 was allotted to Jinachandra Gowder. The other male members were allotted properties. Thus, there was a disruption of the joint family. Jinachandra Gowder has taken plaint schedule item No. 1 as his separate property. Thereafter, 5th defendant -- another son -- was born to him through the first defendant and thus this property has become a joint family property between Jinachandra Gowder and his son, the 5th defendant. Jinachandra Gowder has acquired item Nos. 2 and 3 with the income derived from item No. 1. Item Nos. 4 and 5 were excluded from the partition. The second defendant, who has right over item No. 5, gifted the said property to the 5th defendant. Thus, according to the plaintiffs, on the death of Jinachandra Gowder they had one-half right over the plaint schedule items 1 to 3 and the 5th defendant has got the remaining one-half right. The plaintiffs would allege that on the death of Jinachandra Gowder his right over the property devolved on the plaintiffs and defendants equally u/s 8 of Act XXX of 1956. According to the appellants, the right over the plaint schedule properties devolved on them alone on the death of Jinachandra Gowder as per Section 6 of the Act XXX of 1956. They would contend that no share is due to the plaintiffs and second defendant as they have separated from the coparcenary long back.

The question for consideration is whether the succession as per Section 8 of the Act XXX of 1956 or survivorship as per Section 6 of the said Act is the principle to be adopted in this case.

10. The Act XXX of 1976 came into force in the year 1976. Section 4 of the said Act provides as follows :--

"Joint tenancy to be replaced by tenancy in common : (1) All members of an undivided Hindu family governed by the Mitakshara law holding any coparcenary property of the day this Act comes into force shall, with effect from that day, be deemed to hold it as tenants-in-common, as if a partition had taken place among all the members of that undivided Hindu family in respect of such property and as if, each one of them is holding his or her share separately as full owner thereof."

From the above section, it can be seen that on the date of commencement of the Act XXX of 1976, the status of coparcenary in a joint family property has been lost and the coparceners have become tenants in common thereafter as if a statutory partition has taken place among all the coparceners. Therefore, after the commencement of the Act XXX of 1976, the coparceners attained the status as tenants in common, which means Jinachandra Gowder and the 5th defendant get definite shares in the property. The learned counsel for the appellants submitted that Act XXX of 1956 being an enactment passed by the Parliament, it prevails over the provisions of the Act XXX of 1976, which is only a law passed by the Legislature of the State. Article 254 of the Constitution reads as follows :--

254. (1) if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent list, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for consideration of the President and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State".

Clause (1) of Article 254 lays down a general rule. Clause (2) is an exception to Clause (1) and the proviso qualifies that exception. The question of repugnancy

arises only in connection with the subjects enumerated in the Concurrent List. The question of the Act XXX of 1956 prevailing over the Act XXX of 1976 arises only if any of the provisions of the State law is repugnant to the provision of law passed by the Parliament. Admittedly both the Union and the State have concurrent powers in respect of the subject. Clause (1) says that if a State law relating to a concurrent subject is repugnant to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. In this connection, the following points should be noted. The first is that the State law does not become void as soon as the Union Parliament legislates with respect to the same subject. There is nothing to prevent the State Legislature to legislate with respect to a Concurrent subject merely because there is a Union law relating to the same subject. Article 254(4) is attracted only if the State law is repugnant to the Union Act, which means that the two cannot stand together. Clause (2) of Article 254 is an exception to Clause (1), viz., that if the President assents to a State law which has been reserved for consideration under Article 200, it will prevail notwithstanding its repugnancy to an earlier law of the Union. Thus, even if there is repugnancy, the law made by the Legislature of the State, if it was reserved for consideration of the President and has received his assent, will prevail in the State. Thus, from the Act XXX of 1976, it can be seen that it was reserved for the consideration of the President and the President has given his assent on 10-8-1976. Therefore, the argument of the learned Counsel for the appellants that the State enactment cannot override the Central enactment cannot be accepted as correct.

11. The appellants rely on Section 6 of the Act XXX of 1956 to succeed to the estate of the deceased Jinachandra Gowder. Section 6 relates to devolution of interest in coparcenary property. On the date of death of Jinachandra Gowder, there was no coparcenary as the same has been abolished by the Act XXX of 1976. Therefore, Section 6 of the Act XXX of 1956 is not applicable to the facts of this case. By virtue of Section 4 of the Act XXX of 1976, the joint tenancy has been replaced by tenancy in common. Thus, Jinachandra Gowder and the 5th defendant have become tenants in common, each is having one-half right over the properties, item Nos. 1 to 3. Section 8 of Act XXX of 1956 provides that the property of a male Hindu dying intestate shall devolve firstly upon the heirs, being the relatives specified in Class I of the Schedule. Class I takes in son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, etc. The plaintiffs and defendants are admittedly the children of Jinachandra Gowder, who come under Class I of the Schedule. Therefore, so far as the one-half of the right of Jinachandra Gowder is concerned, the heirs in Class are equally entitled to the property. The plaintiffs are, therefore, entitled to 2/16 shares and 1/16 share each by defendants 1 to 4 and 6 and the 5th defendant is entitled to 9/16 shares over the said properties.

12. The next question is whether a Hindu converted into Muslim can claim any right under the Act XXX of 1956. The second plaintiff K.J. Vijayan embraced

Muslim faith and has become Sh"amsudeen. According to the defendants, he being a Muslim is not entitled to inherit the property of a Hindu. This question was not pressed at the time of hearing. Therefore, the finding of the Court below that he is also entitled to share over the property is confirmed.

13. I do not find any reason to interfere with the concurrent findings entered by both the Courts below. The questions of law Involved in this case have been correctly interpreted by the Courts below. Hence, this appeal is liable to be dismissed.

S.A. 469/1992:

14. This appeal is directed against the decree and judgment in A. S. 60/1990 of the Sub-Court, Sulthan Bathery, which was filed against the decree and judgment in O. S. 31/ 1988 of the Munsiffs Court, Kalpetta. The appellants in S.A. No. 223/1994 are the appellants in this appeal also. The respondent herein is the second respondent in S.A. 223/1994. The appellants filed O. S. 31/ 1988 for damages against the respondent Shamsudeen (K. J. Vijayan) on the allegation that during the pendency of the partition suit the defendant Shamsudeen plucked coffee and pepper from the plaint schedule property. The appellants had taken out a Commission to assess the damages caused to them and the Commissioner assessed the damages to the tune of Rs. 3,550/-. Therefore, the plaintiffs have filed the above suit for damages. The trial Court dismissed the suit holding that the defendant being a co-owner, the plaintiffs cannot restrain him from plucking coffee and pepper from the plaint schedule property. Aggrieved by the said decree and judgment, the plaintiffs filed A.S. 60/1990 before the Sub Court, Sulthan Bathery. The learned Sub Judge dismissed the appeal, confirming the judgment and decree of the trial Court. Aggrieved by the said decree and judgment, the plaintiffs have filed this Second Appeal.

15. In view of my findings in S.A. 223/ 1994, the defendant being a co-owner, the plaintiffs are not entitled to file a suit for damages if the defendant has taken any income from the property. Therefore, this Second Appeal is liable to be dismissed.

S.A. 958/1989-E:

16. This appeal is directed against the decree and judgment in A.S. 36/1987 of the Sub Court, Sulthan Bathery, which was filed against the decree and judgment in O.S. 321/1986 of the Munsiffs Court, Kalpetta, The first appellant is the second wife of Jinachandra Gowder and appellants 2 to 5 are her children through Gowder. O. S. 321/1986 was a suit filed by the appellants for eviction with arrears of rent. Jinachandra Gowder let out a building to the defendant therein on a monthly rent of Rs. 10/-. The first defendant Ananda Krishnan had also executed a rent deed. He had sublet the building to defendants 2 to 5 in that suit. The first defendant denied the lease deed executed by Jinachandra Gowder. Defendants 2 and 3 contended that they are occupying the building under a rent

deed executed by Nagakumar, the son of Jinachandra Gowder. The trial Court framed five issues, examined P. W. 1, D.Ws. 1 and 2 and marked Exhibits A1 to A6 and Exhibits X1 to X4. After trial, the trial Court dismissed the suit, holding that the plaintiffs failed to prove lease arrangement. Aggrieved by the said judgment and decree, the plaintiffs have filed A.S. 36/1987 before the Sub Court, Sulthan Bathery. The learned Sub Judge dismissed the appeal confirming the judgment and decree of the trial Court. Aggrieved by the said judgment and decree, the plaintiffs have filed this Second Appeal.

17. The trial Court found that D.W. 2, who is the son of Jinachandra Gowder through another wife, leased the property to respondents 2 and 3 and they have executed a Koolie Chit in favour of D.W. 2 after the death of Jinachandra Gowder. Since the building was let out by D.W. 2, in view of my finding in S.A. 223/1994 that Nagakumar being a co-owner and he being the lessor, the appellants cannot evict the tenants of Nagakumar. The Courts below correctly appreciated the evidence and came to the conclusion that the appellants-plaintiffs are not entitled to get eviction. Therefore, this Second Appeal is liable to be dismissed.

S.A. 327/1992-E :

18. This Second Appeal is directed against the decree and judgment in A. S. 16/1989 of the Sub Court, Sulthan Bathery, which was filed against the decree and judgment in O.S. 307/1984 of the Munsiffs Court, Kalpetta. The appellants in S.A. 223/1994 filed O.S. 307/1984 against Nagakumar (first plaintiff in O.S. 65/1988). It was filed for a decree of permanent injunction to restrain the defendant from trespassing into the plaint schedule properties on the allegation that Nagakumar having no right over the properties after the death of Jinachandra Gowder is trying to trespass into the property and trying to cause obstruction to the enjoyment of the plaintiffs. The defendant filed a written statement denying the plaintiffs' right. The trial Court dismissed the suit holding that the defendant as a co-sharer to the plaint schedule properties. Aggrieved by the said decree and judgment, the plaintiffs filed A.S. 16/1989 before the Sub Court, Sulthan Bathery. The learned Sub-Judge dismissed the appeal, confirming the judgment of the trial Court. Aggrieved by the said decree and judgment, this Second Appeal is filed.

19. In view of my findings in S. A. 223/ 1994, this Second Appeal is liable to be dismissed.

In the result, all the above appeals are dismissed. No costs.