

(2003) 11 KL CK 0036
In the High Court Of Kerala
Case No : A.S. No. 480/96

Rugmini Amma and Others

APPELLANT

Vs

Pankajakshan

RESPONDENT

Date of Decision : 13-11-2003

Acts Referred:

Citation : (2003) 11 KL CK 0036

Hon'ble Judges : A. Lekshmikutty, J

Bench : Single Bench

Advocate : K.T. Sankaran and Preethi Karunakaran, for the Appellant; N.C. Joseph, for the Respondent

Judgement

A. Lakshmikutty, J.—The Defendant in O.S. No. 172 of 1993 on the file of the Sub Court, Ernakulam is the Appellant herein. The Plaintiff filed the suit for partition. The case of the Plaintiff is that the plaint schedule property having an extent of 88 cents originally belonged to Madhava Menon and his wife Nanikutty Amma. The Plaintiff and the Defendants are the children of above said Madhava Menon and Nanikutty Amma. Madhava Menon and Nanikutty Amma executed a joint Will as document No. 6/67 in respect of the property whereby the northern half of 44 cents was demised to the Plaintiff and the southern 44 cents to the Defendant. Nanikutty Amma died on 31st March 1969. Subsequent to her death, Madhava Menon applied for purchase certificate before the Land Tribunal and obtained the same.; As per the Defendant), Jenmom right absolutely belonged to Madhava Menon alone. The Defendant constructed a residential building in the southern half of the plaint schedule property with the permission of Madhava Menon spending her own funds, Part of the fund required for the above construction and improvement of the property had been raised by executing a mortgage by Madhava Menon and Defendant. Madhava Menon received a huge sum from the Defendant for the purpose of his treatment. He also directed to discharge his debts which the Defendant did. While so Madhava Menon released all his rights over the plaint schedule property to the Defendant as per document

No. 1597/83. The Plaintiff earlier Pled a suit as O, Section No. 294/1983 before the Sub Court, Ernakulam for recovery of possession of his share of 44 cents in the plaint schedule property pursuant to the Will executed by Madhava Menon and Nanikutty Amma. Madhava Menon was the 2nd Defendant in the suit, but he died pending the suit. The Sub Court decreed the suit, against which the Defendant filed A.S. No. 156/88 before the District Court, Ernakulam. The Appellate Court found that the deceased Nanikutty Amma was equally entitled to the property with deceased Madhava Menon and Madhava Menon revoked the Will so far as his share was concerned and the Plaintiff was not competent to recover possession of the northern half of the property as prayed in O.S. No. 294/1983. The appellate court also held that since the share of the Plaintiff, in the above suit was unpartitioned, he could not be given a Decree for recovery of possession and the suit was dismissed. Thereafter the present suit is filed by the Plaintiff for partition and separate possession of his half share over the plaint schedule property.

2. The Defendant contended that out of 88 cents of property covered under the lease deed, 7? cents of property had been allotted to a kudikidappukaran and One cent had been acquired by the Government for widening the road and only 80? cents is available. It is further contended that the Will executed by Madhava Menon and Nanikutty Amma had not taken effect and the same was revoked by Madhava Menon when he executed a release deed in favour of the Defendant and the Plaintiff did not have any right to the plaint schedule property which belonged absolutely to her. She had put up the building expending her own funds and the Plaintiff was not entitled to claim any share in the building. She had discharged the debts incurred by deceased Madhava Menon and that she had advanced money to him to meet the expenses for his treatment.

3. The trial court raised 12 issues for trial. On the side of the Plaintiff, P.W. I was examined and Exts. A-1 and A-2 were marked. On the side of the Defendant, D.W. 1 was examined and Exts. B-1 to B-8 were marked. The court below after trial passed a preliminary decree for partition and separate possession of half of 80.5 cents of property in Survey No. 166/86 of Edappally South Village with the building numbered as C.C. 35/805 described in the plaint. Against the said judgment and Decree, this appeal is filed.

4. The question to be considered is whether there is any reason to interfere with the impugned judgment and Decree. During the pendency of the appeal, the Appellant died and her legal heir was impleaded as additional Appellant No. 2. It is the admitted case of both parties that the property originally belonged to Madhava Menon and Nanikutty Amma, late father and mother of the Plaintiff and late Defendant. They got the property as per registered lease deed No. 747/1119 M.E. Ext. B-4 is the joint Will executed by both parties. As per the Will, the testators late Madhava Menon and Nanikutty Amma bequeathed the property to the Plaintiff and the Defendant. The northern half was bequeathed to the Plaintiff and the southern half to the Defendant. Nanikutty Amma died on 31st March

1969 without revoking the Will. So according to the Plaintiff, after the death of Nanikutty Amma, the Will has taken effect and accordingly he is entitled to get half right of the property. After the death of Nanikutty Amma, the Plaintiff filed O.S. No. 294/1983 for partition of his half share over the plaint schedule property. Ext. A-1 is the copy of the judgment in O.S. No. 294/1983 and Ext. A-2 is the copy of the judgment in A.S. No. 156/1988 of the II Additional District Court, Ernakulam which was preferred against Ext. A-2. Madhava Menon was the 2nd Defendant in the said suit. The appellate court found that the property was not partitioned between the legatees and hence the suit was dismissed.

5. It is contented by the Defendant that the Plaintiff is not entitled to get half right over the property since the father has revoked the Will during his lifetime and, hence he is not entitled to any share over the property of their father. In the earlier suit (Ext. A-1) the court found; that Madhava Menon is not competent to revoke the Will executed by his wife Nanikutty Amma and it has taken effect on the death of Nanikutty Amma. Madhava Menon executed Ext. B-5 release deed in respect of his entire right over the property to the Defendant. Ext. B-2 is the purchase certificate obtained by Madhava Menon in respect of the plaint schedule property. Even if the purchase certificate was obtained by Madhava Menon in respect of the entire property, being a co-owner it enures to the benefit of the other co-owner also. So even if Madhava Menon has executed Ext. B-5 release deed in favour of the Defendant in respect of the entire property, she will get only the half share of Madhava Menon. It is contended by the Defendant that she has constructed a substantial building in the plaint schedule property with permission of Madhava Menon. Further she discharged the debts of Madhava Menon at his request and also advanced money to him for his treatment. As matters stands with regard to the half right of Madhava Menon, he had revoked the Will and executed Ext. B-5 release deed in favour of the Defendant. So in respect of one half right of Madhava Menon is concerned the Defendant became the absolute owner. With regard to the half share of their mother the Will has come into existence and the Plaintiff and Defendants are equally entitled to their mother's half right. Even if it is accepted that Madhava Menon is not competent to execute release deed in respect of the entire property, he can release his one half right over the property. So the Court below went wrong in giving a Decree for partition of one half right to the Plaintiff. The Defendant is entitled to 1/2 right of Madhava Menon and one half right of Nanikutty Amma. Thus she is entitled to 3/4 right of the plaint schedule property.

6. The court below found that only 80 cents of property is available for partition. Joint will can validly be made by two persons. A joint Will made by two or more testators contained in a single document duly executed by each testator, disposing either of their separate properties or of their joint properties cannot be recognised as a single Will and it operates on the death of each testator as his Will disposing of his own separate property and is in effect two Wills. There is also recital to the effect that the testator have the right to modify the Will or cancel the same. But it does not authorise the surviving testator to modify or

cancel the Will after the death of one of them regarding the bequest of deceased testator. The intention of the parties is to be looked into. From Ext. B-4 it can be seen that the intention of the mother was to bequeath her half right to her two children. Therefore, Madhava Menon is not competent to cancel the entire Will. But he is entitled to cancel in respect of his half right. As per Ext. B-5 release deed, he has released his right to the Defendant. So in respect of his half share, the Defendant has become absolute owner of the property. Then with regard to half share of Nanikutty Amma, both the Plaintiff and Defendant are equally entitled to half share each. Thus the Defendant is entitled to $\frac{1}{4}$ share over the plaint schedule property and the Plaintiff is entitled to get partition of $\frac{1}{4}$ share over the entire property or in other words he is entitled to get one half of his mother's half share. Hence the court below was not right in passing a Decree for partition of half right over the entire property.

7. Now the next question to be considered is whether the Defendant is entitled to get any special right over the building in the plaint schedule property. The Defendant gave evidence that the building was constructed by her spending her own money. For completion of the said building, her property has been mortgaged and the mortgage money also was utilised for completion of the building. She is residing in the said building. Ext. B-1 is the deposition of the Plaintiff in O.S. No. 294/1983. At the time of examination, the Plaintiff admitted that the Defendant constructed a building in the plaint schedule property. The entire money was not spent by her. The Plaintiff admitted that the Defendant was in possession of the property from the very beginning and she was dealing with the property from 1983 onwards. According to him, the construction of the building was started in 1978 and the building was in the name of their father. Admittedly at the time of Ext. B-4, there was no building in the property. The Plaintiff has no case that the building in the property has been constructed by him. If that be so, the Plaintiff is not entitled to get the share in the building and the building absolutely belongs to the Defendant. The court below found that the building also is partible. Even if the father has spent any money, as per Ext. B-5 he has released all his rights to the Defendant. So at any rate the Plaintiff is not entitled to get partition of the building, but he is entitled to $\frac{1}{4}$ th share over the entire property allowing the Plaintiff for partition. The Decree and judgment of the court below are modified and the Plaintiff is entitled to partition and separate possession of half of his mother's share over the property, i.e. $\frac{1}{4}$ right over the plaint schedule property excluding the building. The appeal suit is disposed of accordingly.