

IN THE COURT OF SUB JUDGE, KOCHI

Present :

Smt. Rejani Thankappan, Sub Judge, Kochi

Tuesday, the 13th day of August, 2024/ 22nd Sravanam, 1946.

O.S.No. 35/2022

Plaintiff :-

Rajeev R., aged 58 years, S/o Rajan, Ramadi House, Tagore Road, Nayarambalam P.O., Pin-682509.

By Advs. Joby Kuriakose T.J & Subash C.B

Defendants:-

Rajesh R, aged 51 years, S/o. Rajan, Ramadi House, Kudungassery West, Nyarambalam P.O., Pin-682509.

By Advs. Sibi Karun, Sreejith M.S & R.Rajesh

This suit filed under Section 26 read with Order VII Rule 1 of the Code of Civil Procedure, 1908.

This suit having come up for hearing before me on 06.08.2024 and the court on 13.08.2024 delivered the following :-

J U D G M E N T

The suit is for partition.

2. The plaint averments are as follows:- The plaintiff and defendant are brothers. The plaint schedule property is the 24.500 cents of land comprised in (Old survey No.107/1) Resurvey No.146/9 in block No.6 of Nayarambalam Village.

The plaint schedule property was owned and possessed by the plaintiff and the defendant jointly as co-owners. They obtained the plaint schedule property as per sale deed No.1132/1990 of Njarakkal Sub Registrar office. The plaintiff is entitled to get 1/2 share over the plaint schedule property and the defendant is entitled to get 1/2 share of undivided right over the plaint schedule property. The defendant is trying to change the nature of the plaint schedule property without obtaining permission or consent from the plaintiff. If the defendant is putting up any substantial construction on the plaint schedule property, it will be prejudicial to other co-sharers. Since the co-owner has an interest in the whole property and also every parcel of it. On 02.03.2022 the plaintiff approached the defendant and expressed his desire and necessity to partition the plaint schedule property by metes and bounds. But defendant is not amenable to that. To settle the issue, the plaintiff's near relatives intervened in the matter. But their attempts were futile. Hence the suit.

3. The defendant filed written statement with following contentions:-
Admitted that the plaintiff and this defendant are entitled to get one half share each over the plaint schedule property. The defendant is not trying to change the nature of the plaint schedule property without obtaining the permission or consent from the plaintiff. The defendant is not putting up any substantial construction in and upon the plaint schedule property. On 02.03.2022 the plaintiff had never

approached this defendant and expressed his desire and necessity to partition the plaint schedule property. Similarly, none of this defendant's relatives had made any interference as alleged by the plaintiff. The sale deed No.1132/1990 of SRO Njarakkal have been executed by Smt.Thankamma, who had categorically recited in the said sale deed that her son in law viz. Rajan, who in turn the father of both the plaintiff and the defendant had already constructed a residential building in the property covered by sale deed No.1132/1996 of SRO Njarakkal and he has been residing along with his family. While executing the sale deed, the intention of Thankamma is very clear that the residential building constructed by father of this defendant had not been included in the property covered by the said document. The said aspect is very clear from the description of the schedules of the said sale deed. The said construction had taken place much before the execution of the above said sale deed. Therefore, it is crystal clear that the consideration shown in sale deed No.1132/1990 was only with respect of land alone having an extent of 22.500 Cents excluding the residential building constructed by Shri.R.V.Rajan, father of both plaintiff and defendant. Therefore, the said extent of land alone can be partitioned equally between the plaintiff and the defendant and the residential building constructed by their father does not come within the ambit and scope of partition. The said residential building is more than 50 years old and Shri.R.V.Rajan is maintaining the said building. Electric connection, water

connection etc are in the name of the father of the defendant. The sole intention of the plaintiff is to usurp the residential building which absolutely belongs to the father of the defendant and is exclusively owned and possessed by him. Father of the defendant is residing in the said building along with his wife and this defendant. The plaintiff has never cared to look after the affairs of his aged father. It is also pertinent to note that the address that of mother of this defendant shown in the ration card is that of the residential building and the name of plaintiff does not find a place in it. Similarly, the gas connection which has been availed by the father of this defendant from Karuna Agencies, Elamkunnappuzha is that of the residential building constructed by himself. Father is now being looked after by this defendant. The said aspect has been concealed by the plaintiff from the notice of this Hon'ble Court with malafide intention. Father of the defendant is entitled to reside in the said residential building and the same has to be sustained even though it is granted to partition of the land. On an earlier occasion, the plaintiff opposed the visits of close friends and relatives of the father of the defendant in the said residential building. Thereupon the matter was taken up before Aryavamsa Shudaniya Sabha whereby the matter was settled amicably between the plaintiff and the defendant herein in the year 2000 whereby it was mutually agreed that the portion wherein the residential building is situated would be allotted as the share of the plaintiff and the said extent of land which would devolve upon would be

excluding the residential building constructed by his father. It was also agreed that the front portion of the property would be allotted to the defendant. The said understanding had been reduced into writing and it was also agreed while signing the family settlement that the entire property would be duly measured and only thereafter they would take their respective shares. It was specifically made clear to the plaintiff that the share which would be obtained by him on the backside, would be excluding the residential building constructed by his father. The plaintiff had been fully agreeable for the said stipulation and he had entered and signed the said family settlement out of his free will, consent and full knowledge. The plaintiff has also concealed the said aspect from the notice of this Hon'ble Court. Therefore, in the said peculiar circumstances the plaintiff is bound by the principle of estoppel by act and deeds. By giving due importance to the said undertaking reduced into writing, the present reliefs seen prayed for by the plaintiff through the above suit has become infructuous. Since, the partition has already come into effect in the aforesaid circumstances, there is no need for any further partition and this defendant is ready and willing to partition the entire property excluding the residential building in the style and manner as had been duly agreed before the Aryavamsha Shudaniya Sabha. The plaintiff out of his free consent, will and knowledge had agreed to the settlement which had been reduced into writing before the above said Sabha. Thereafter, the plaintiff with utmost malafide intention have

approached this Hon'ble Court by concealing the mode of partition which had been mutually agreed between the plaintiff and the defendant. The father of this defendant as well as that of the plaintiff have got complete legal right to reside in the said residential building and nobody has any right to oust him from the said residential building. Hence the defendant prays for dismissing the suit.

4. Heard both sides.

5. After considering the rival contentions between the parties following issues were framed for consideration by the Learned Predecessor in office:-

- (i) Is the building situated in the plaint schedule property?
- (ii) Whether the family settlement executed before the Aryavamsha Shudaniya Sabha is valid and binding upon the parties?
- (iii) What is the order as to costs?

6. In addition to the above said issues following additional issues were framed for consideration:

- (iv) Whether the plaint schedule property is partible?
- (v) If so what is the share of the plaintiffs?

7. In order to prove the case, the plaintiff is examined as PW1 and Exhibit A1 document marked. From the side of the defendant DW1 to DW3 were examined and Ext.B1 document marked.

8. Point No.1,2, 4 and 5 :-

For the sake of convenience these points are considered together. The case of the plaintiff is that plaint schedule property jointly owned and possessed by him and his brother as per Exhibit.A1 Sale Deed No.1132/90 of Njarakkal SRO executed by their grand mother Thankamma. As per Ext.A1 they are entitled to get half share each over the plaint schedule property. Plaintiff was examined as PW1 and the defendant was examined as DW1. According to DW1 in Exhibit A1 document it is clearly stated that the residential building situated in the plaint schedule property was constructed by Mr. Rajan, who is the son of Thankamma and father of PW1 and DW1 and he has been residing along with his family in the residential building situated in the plaint schedule property. The consideration mentioned in Ext.A1 Sale Deed was only with respect to the land having an extent of 22.500 cent alone excluding the residential building. The residential building constructed by the father of PW1 had not been included in the property covered by Ext.A1 document. PW1 filed affidavit in lieu of examination in chief claiming his one half share of plaint schedule property and alleging that defendant is trying to change the nature of the plaint schedule property without obtaining his consent. It is admitted by PW1 in cross examination that a residential building constructed by his father Rajan is situated in the plaint schedule property and in Ext.A1 nothing has been mentioned about the partition of the above said building. PW1 also admitted in his cross examination that since there was a dispute between the PW1

and DW1 the matter was taken up before their Sabha named Aryavamsa Shudaniya Sabha and the matter was settled in the Sabha in the year 2000. As per the agreement the residential building situated in the property allotted to PW1 would be allotted to the share of the plaintiff and the front portion of the plaint schedule property would be allotted to the defendant, and also mutually agreed that the share allotted to PW1 would be excluding the residential building constructed by his father, thereby a family settlement was made between the parties due to the intervention of the Aryavamsa Shudaniya Sabha. Admittedly, these factors were not mentioned in the plaint or affidavit by PW1. In addition to this, it is also admitted by PW1 that he has no right over the plaint schedule building constructed by his father.

9. The defendant who had filed affidavit in lieu of cross examination in chief stated that PW1 had filed the suit with an intention to usurp the residential building belongs to their father which is exclusively owned and possessed by him. DW1 is residing in the building along with their mother and father and they have life interest over the residential building situated in the plaint schedule property. PW1 has never agreed to look after the affairs of aged parents and he is residing away from the plaint schedule property. According to DW1 he is ready and willing to partition the plaint schedule property in accordance with the family settlement entered between the parties before the Aryavamsa Shudaniya Sabha. In cross

examination DW1 admitted that he is residing along with his parents and they are under the care of him. According to DW1 he is ready to partition of the plaint schedule property in accordance with the family settlement entered between the parties in the year 2000.

10. DW2, one of the member of Aryavamsa Shudaniya Sabha deposed that PW1 and DW1 in this case are the members of their Aryavamsa Shudaniya Sabha. DW2 further stated that on 02.12.2005 he was the committee member and Panchayath committee member of Aryavamsa Shudaniya Sabha. At that time father of PW1 was the Vice President of the above said Sabha. Since the matter in dispute considered by the Sabha is in between the sons of Vice President he had not signed in the decision taken regarding this matter. He admitted his signature in the family settlement entered between the parties in accordance with the decision taken by the Aryavamsa Shudaniya Sabha on 02.12.2005 and he identified the signature in Ext.B1 page No.149 of the minutes dated 02.12.2005 of Aryavamsa Shudaniya Sabha as a witness.

11. DW3 deposed that while he was acting as the Secretary of Aryavamsa Shudaniya Sabha a property dispute arose between the sons of Sri. Rajan. Hence, he had filed a complaint before the Sabha and the same was settled between the parties with the intervention of this Sabha in the year 2005. Exhibit.B1 relevant page No.149 and 115 of the minutes of the above said Sabha produced by him and

deposed that the same was recorded by him on his own handwriting. According to him, as per the terms of Exhibit.B1 property along with the residential building was given to PW1, who is the elder son of Mr. Rajan and the remaining 11 ½ cents of property was allotted to DW1. In order to get an access to the respective shares a way was allotted through the southern portion of the plaint schedule property in east west direction. According to DW3 in Ext.B1 it is stated that both the parties have got absolute right over the share of the plaint schedule property after life interest of the parents. These agreements were accepted by both the parties and PW1 and DW1 had put their signature in Ext.B1 in their presence. In cross examination DW3 deposed that the complaint was made to the Sabha by Mr. Rajan and he had attended the committee meeting on that day but, he was removed from taking any decision in the complaint filed by him. In Exhibit.B1 it was decided to allot 13 cents of property and the residential building in the plaint schedule property to PW1. DW3 deposed that both PW1 and DW1 are informed them that they did not want the house situated in plaint schedule property since they could not have interest to take care of the parents. DW3 admitted that now parents are residing with DW1.

12. Considering the rival contentions in this case it can be seen that there was no dispute regarding the share of PW1 and DW1 since it was already mentioned in Ext.A1 and Ext.B1. The dispute is only with regard to the residential

building constructed by father of PW1 and DW1. Admittedly plaint schedule property is partible and there is no dispute with regard to it. In Ext.A1 nothing has been mentioned about the portions allotted to PW1 and DW1. At the same time, in Ext.B1 family settlement between the parties due to the intervention of the Aryavamsa Shudaniya Sabha it is clearly stated and decided to allot half portion of the plaint schedule property and the residential building situated therein to PW1 and the remaining portion allotted to DW1. Both signed the document. PW1 has no case that he had not put his signature in Exhibit.B1 document. In **Subraya M.N. vs.Vittala.M.N. and others [2016 KHC 6454]** the Hon'ble Apex Court has held that regarding family and personal laws "Unregistered document of family arrangement by way of corroborative evidence explaining nature of arrangement arrived at between parties, conduct of plaintiff members in receiving money from defendant members of the family in lieu of relinquishing their interest in certain family properties and oral evidence etc. are to be considered." In the present case, Ext.B1 family settlement reduced into writing, due to the intervention of the Aryavamsa Shudaniya Sabha. Even though it is not a registered document it can be used as a piece of evidence explaining the settlement arrived and the conduct of the parties in accepting their respective shares. PW1 and DW1 had not denied execution of Ext.B1 document. From the evidence of DW2 and DW3 and from Ext.B1 it can be seen that building constructed by father of PW1 and DW1 is

existed in plaint schedule property and the parties had already executed Ext.B1 family arrangements in respect of Plaint Schedule Property. DW1 has no objection in allowing the partition of plaint schedule property after measure out the plaint schedule property in accordance with the terms and conditions in Ext.B1. Hence in the interest of justice and fortifying the above decision the plaint schedule property is to be divided into two equal parts and plaintiff and defendant is entitled to get one half share each over the plaint schedule property.

13. In the result, Preliminary Decree is passed as follows:-

- (i) The plaint schedule property is to be partitioned by metes and bounds into 2 equal shares in accordance with Ext.B1.**
- (ii) The plaintiff is entitled to get $\frac{1}{2}$ share over the plaint schedule property.**
- (iii) The defendant is entitled to get $\frac{1}{2}$ share out of the plaint schedule property.**
- (iv) Cost of the suit shall come out of the estate.**

Dictated to the Confidential Assistant, typed by her corrected by me and pronounced in open court on this the 13th day of August, 2024.

Sd/-
REJANI THANKAPPAN
SUB JUDGE

APPENDIX:-

Plaintiff's Exhibits:-

A1 Original Sale deed No.1132/1990

Defendant's Exbts:-

B1 02.12.2005 Minutes page No. 149,150 of Aryavamsa Shudaniya Sabha.

Court Exbts:- Nil

Plaintiff's witness:-

PW1 24.06.2024 Rajeev R

Defendant's witness:-

DW1 29.06.2024 Rajesh R

DW2 22.07.2024 Ramakrishnan

DW3 22.07.2024 K.K Bhasi

Court witness:- Nil

Typed by: vkg

Comp by:am

Sd/-
SUB JUDGE
(By Order)

/True copy/

Sheristadar

Judgment

O.S.No. 35/2022

Dated:13.08.2024