

IN THE COURT OF THE MUNSIFF OF ALATHUR

Present:- Smt. Anju Meera Birla, Munsiff

Tuesday, 28th day of June, 2016
07rd day of Ashadha, 1938 S.E)

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ORIGINAL SUIT No.487/2014

1. Kannamani, W/o Kesavan & D/o Mayandi,
aged 55 years, residing Kuttapura veedu,
Pullampadam, Vandazhi(PO), Alathur.

2. Madhavi, W/o Krishnankutty & D/o Mayandi,
aged 52 years, residing Kuttapura veedu,
Pullampadam, Vandazhi(PO), Alathur.

3. Valsala, W/o Balakrishnan & D/o Mayandi,
aged 45 years, residing Plachikkattu veedu,
Palamukku, Ayiloor(PO), Chittur.

4. Radha, W/o Parameswaran & D/o Mayandi,
aged 55 years, residing Karapotta,
Kannambra (PO), Alathur.

Plaintiffs

Vs.

1. Velappan, S/o Mayandi, Aged 65 years,
residing at Angod House, Pandamkode,
Nellikode, Moolamkode (PO), Alathur.

2. Sreedharan, S/o Mayandi, Aged 61 years,
residing at Angod House, Pandamkode,
Nellikode, Moolamkode (PO), Alathur.

Defendants

Defendants

This suit is coming on 17th day of June, 2016 for final hearing before me in the presence of Sri.K.P. Gopalakrishnan and Titus Joseph, Advocates for plaintiffs and of Sri. N.R. Venkitanaryanan, Advocate for 1st defendant and 2nd defendant was called absent, set exparte and having stood over to this day for consideration this this court delivered the following.

J U D G M E N T

Suit for partition.

2. Plaint averments in short are as follows:

The plaint schedule property originally belonged to the grand-father of plaintiffs and defendants, Velankutty and he was living with his family in the house situated in the property. It was held in *tharikutti* right under the land owner Puzhakkalidom - oral lease, for *kudiyirippu*. On the death of grand-father, it devolved upon his son, Mayandi, father of plaintiffs and defendants. Formerly there were two houses in the property which are no longer standing. On the death of Mayandi, 1st defendant is holding the property for and on behalf of other co-owners. The plaintiffs and defendants are entitled to get 1/6 shares each in the suit property. The plaintiffs seeks share of mesne profits from the date of suit till actual delivery of their share from the 1st defendant, the plaint schedule property being a fenced compound with jack fruit trees and coconut palms. In spite of demand including on 10.10.2014, the 1st defendant refused partition and

severance of shares and hence the present suit for partition.

3. The 2nd defendant remained *exparte*, while 1st defendant filed written statement contending as follows:

The suit is not maintainable either in law or on facts. The plaint schedule property is not a co-ownership property and cannot be partitioned. The 2nd defendant has been living away from the family for more than 30 years. The plaintiffs are not entitled to get share of profit. The property which belonged to their father was partitioned as per partition deed No.2417/1973 of SRO., Alathur and the said Mayandi had no property at the time of his death. Velankutty, Mayandi, plaintiffs and defendants following Hindu Mitakshara Law, effected partition as such. The allegation that the property belonged to Puzhakkalidom jenmam is denied. Actually the property belonged to Moolankode Mathilenkal Govindan Nair jenmam and gave the property as *thodika pattom* to the grand-father, Velankutty, who during his lifetime gave possession to 1st defendant, who has continued solely to possess the same. Mayandi had no right over the said property. In the year 1989 Mayandi had given his property to the 2nd defendant as per settlement deed and was not in possession of any property at the time of death. Velankutty, the grand-father had married twice. His first wife died childless after which he

married 2nd wife, Madhavi with whom he had Mayandi and two other daughters. The plaintiffs and defendants are the children of Mayandi and the successors of deceased Thanka are alive. The plaintiff schedule properties are in exclusive possession and enjoyment of the 1st defendant and nobody has any right over the same, the properties are not partible. Hence the suit is to be dismissed.

4. Following issues arise for consideration:

- 1) Whether the plaintiff schedule property is partible or not?
- 2) Whether the plaintiffs are entitled to get 4/6 shares in the plaintiff schedule property?
- 3) Whether the plaintiffs are entitled to get separate possession of the property as prayed for?
- 4) Reliefs and costs ?

5. From the side of plaintiffs, 2nd plaintiff was examined as PW1 and Exts.A1 & A2 were marked. From the side of defendants, there is no oral evidence, but Exts.B1 to B3 were marked through PW1.

6. Heard both sides and plaintiffs filed argument notes.

7. Issue No.1: Plaint and written statement averments

have already been referred to. The case of plaintiffs is that they are entitled to get 4/6 shares in the property of their grand-father, who died intestate. Grand-father Velankutty is stated to have had possessory right over the plaint schedule property. The defendants do not dispute that possession was vested in the deceased grand-father. The defendants also did not dispute that the plaintiffs and defendants are successors of his grand-father. Though the date of passing away of deceased Velankutty is not brought out through the pleadings, PW1 deposed that same is accrued in 1974. The same is not seen disputed by the defendants. Though there exists dispute as to what sort of rights the deceased Velankutty had over the plaint schedule property, the fact remains that even possessory title is divisible and would hold against the every one else other than the true owner. In **Pathukutty and Another v. Aisakutty and Others -2014 (2) KHC 212**, it was held that “possessory title is good title against all though not against the true owner. Therefore, possessory title is heritable, divisible and transferable. Possessory title is distinct and different from proprietary title.” In the said decision, the plaintiffs and defendants were found to be in joint possession, though they could not prove title and were held entitled to partition on the basis of joint possession which was found to be different from proprietary title and good title against all except the true owner and the dictum in the said case can be seen to apply to

the case at hand.

8. Next question in deciding whether the plaint schedule property is partible as regards the claim made by 1st defendant that said Velankutty was succeeded by 3 children including the father of the plaintiffs and defendants and one Thanka and Janaki of whom successors of deceased Thanka are available. However, nothing has been brought out on record by the 1st defendant to show the existence of such legal heir to the property. The 2nd defence advanced by the 1st defendant is that all the property belonging to Mayandi was partitioned as per partition deed No.2417/73. On going through Ext.A1 partition deed No.2417/13 between Velan, the grand-father, Mayandi, the son and the 1st and 2nd defendants, who are the grand-children of Velan and sons of Mayandi, all the property held have been decided to be partitioned. As per the deed, Velan can be seen to have given up his rights as regards the properties held jointly by the family. Some portion including the house and the appertenant property and attachments have been set apart from partition. Remaining properties can be seen to be partitioned between Mayandi and his two sons. The plaintiffs can be seen to be claiming the portion which has been set apart without partition under Ext.A1. The plaintiff as PW1 has deposed along these lines. Though PW1 got confused over the exact property which is

sought to be partitioned, she can be seen to have emphatically stated that the tharavad was available for partition and the other properties were not so available. This would be substantiated by the terms in Ext.A1 document which cannot be denied by the 1st defendant who is a party to the document.

9. It is in this circumstance that the property can be seen to be in the name of deceased Velankutty. The 1st defendant claimed that during his lifetime the said Velan had given schedule the property to his exclusive possession which continued as such with the 1st defendant for which he has relied on Exts.B1 to B3. However, no claim of ouster has been putforth by 1st defendant requiring the matter to be adjudicated as such. Mere pleading of exclusive possession is not seen to prove ouster which requires concrete proof of having enjoyed the property to the exclusion of other co-owners with knowledge of other co-owners as to such exclusion. Also when PW1 was examined, it was put across to her that even before 1.4.1964, first defendant was in possession of the property and was given pattam. When considering this contention, the fact that the first defendant is aged 65 years in 2014 has to be calculated to find the age of the 1st defendant to be 15 years in the year 1964. There is nothing on record to show that deceased Velan preferred his grand-son namely 1st defendant as against his son and the 2nd defendant grand-son, to put the 1st

defendant in exclusive possession of plaint schedule property. This contention can be given a go-by especially when taking into account the fact Ext.A1 partition is effected of all the properties in 1973 between Velan, son and grand-sons including the first defendant and the plaint schedule property can be seen kept aside saying impractically in partition and if Velan had intended to have given exclusive possession of the same to the 1st defendant, the same would have found mention in the said deed. Thus issue No.1 is found in favour of the plaintiffs.

10. Issue No.2: In the light of findings under Issue No.1, there having no other heirs before the Court, the plaintiffs can be seen to be equally entitled as the defendants in the plaint schedule property. Issue No.2 is found in favour of plaintiffs.

11. Issue No.3: In the light of findings under Issue Nos.1 & 2, the plaintiffs are seen entitled to get separate possession of the plaint schedule property. This issue is also found in favour of plaintiffs.

12. Issue No.4: In the light of the findings under issues Nos. .1 to 3, the plaintiffs can be seen to have proved the case alleged.

In the result, the suit is decreed and preliminary decree is passed as follows:

1) Plaint schedule properties shall be divided into 6 equal shares by metes and bounds;

2) The plaintiffs are entitled to separate possession of 4/6 shares jointly and the defendants shall be entitled to 1/6 shares each in the plaint schedule property;

3) Parties shall be put in possession of their respective shares subject to payment of necessary court fees;

4) Quantum of share of profit, if any shall be divisible into equal shares of which four shares shall be allotted to the plaintiffs and the remaining 1/6th the share each to the defendants which shall be adjudicated at the time of final decree;

5) Costs of the suit shall come out of the estate; and

6) The suit is adjourned sine die.

Dictated to the Con.Asst., transcribed and typed by him, corrected and pronounced by me in open court this the 28th day of June, 2016.

Munsiff

APPENDIX :-

Plaintiffs Witness Examined :-

PW1 : Madhavi Krishnankutty

Plaintiffs Exhibits Marked :-

A1 04.12.1973 : Partition Deed No.2417/2012 of
SRO., Alathur entered among Velan
and 3 others.

A2 05.02.2016 : Certificate issued by the
Secretary, Kizhakkenchery Grama
Panchayath.

Defendants Witness Examined :- NIL

Defendants Exhibits Marked :-

B1 01.09.1989 : Water supply scheme consumer's
meter card, consumer No.201 in
the name of M. Velappan.

B2 06.08.2007 : Basic tax receipt issued by the Village
Officer, Kizhakkenchery-I Village in
the name of Velappan.

B3 10.01.2008 : Possession certificate issued by
the Village Officer,
Kizhakkenchery-I Village in the
name of Velappan.

Court Witness and Exhibits :- NIL

Munsiff

Typed by :- K.C. Indira

Compared by :-

Fair/Copies of Judgment
in O.S.487/2014.
Dated : 28-06-2016