

Arundathi Vs. Sasankan

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Court : Kerala

Decided On : Feb-03-2014

Judge : Honourable Mr.Justice K.Harilal

Appellant : Arundathi

Respondent : Sasankan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.HARILAL MONDAY, THE 3D DAY OF FEBRUARY 2014 14TH MAGHA, 1935 RSA.No. 901 of 2010 () ----- AS122008 of SUB COURT, ATTINGAL IN OS1322006 of MUNSIFF COURT, VARKALA ----- APPELLANT/1ST RESPONDENT/PLAINTIFF: ----- ARUNDATHI, W/O. SEKHARAN, VENMANAKKAL HOUSE, VELLATTUMPADOM ROAD, THRIKKAKKARA, ERNAKULAM. BY ADVS.SRI.K.G.BALASUBRAMANIAN SMT.AMBILY (PREMKUMAR) RESPONDENTS: ----- 1. SASANKAN, S/O.SUKUMARAN, PUTHEN VEEDU, NEAR MUKKALUVATTOM TEMPLE, VAKKOM VILLAGE, PO TRIVANDRUM DT PIN695039.

2. RADHAMANI, D/O. ARUNDATHI, VENMANAKKAL HOUSE, VELLATTUMPADOM ROAD, THRIKKAKKARA, ERNAKULAM, THRIKKAKKARA PIN682011 3. SOBHANA, D/O.ARUNDATHI, PULIYANA HOUSE, NEAR KESHAVANMASH HOUSE, N A D ROAD, NEAR LBS, KALAMASSERY PO,

ALUVA ERNAKULAM DT - 683104. R1 BY ADVS. SRI.VAKKOM N.VIJAYAN
SMT.REEJA HARI SRI.RAJESH. K.RAJU SMT.V.RENJU SRI.P.ANIYAN
SRI.M.BALAGOVINDAN R2 BY ADV. SMT.T.SUDHAMANI THIS REGULAR
SECOND APPEAL HAVING BEEN FINALLY HEARD ON0302-2014, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING: BP K. HARILAL,J.

----- R.S.A. NO. 901 of 2010
----- Dated this the 3rd day of February, 2014

JUDGMENT

The appellant is the plaintiff in O.S.No.132/2006 on the files of the Munsiff's Court, Varkala as well as the 1st respondent in A.S.No.12/2008 on the files of the Sub Court, Attingal. This Regular Second Appeal is filed against the judgment and decree passed in the above Appeal Suit. The respondents are the children of the appellant. She instituted the suit for a decree for partition of the suit properties which belong to her and the late Sri.Sukumaran, her husband and the father of the respondents. The plaint scheduled property was purchased in the name of the plaintiff and her deceased husband in the year 1974 by Sale Deed No.28/1974 of the Sub Registrar's Office, Kadakkavoor, and it was in the joint possession and title thereafter. While so, the husband of the plaintiff as well as the father of the respondents died on R.S.A. No. 901/2010 2 17.10.1975 and the plaintiff and the defendants are in joint possession and enjoyment of the said property thereafter. The deceased Sukumaran has no other legal heirs. A new building is also constructed in the plaint scheduled property at the expense of the plaintiff and the defendants, in addition to the old existing house therein and the second defendant is residing with his family in the said newly constructed building. According to the plaintiff, she is entitled to get 5/8th share in the property. Though she requested the defendants to effect partition, they refused to do so and hence the suit. The first defendant was set ex-parte, and the defendants 2 and 3 filed a written statement raising four contentions. They dispute the right of the plaintiff to get the plaint scheduled property partitioned. According to them, the property is in the adverse possession of the second defendant for the last more than 15 years and the right of the plaintiff had been lost thereby.

2. Secondly, they denied the claim that the plaintiff was the legally wedded wife of the deceased father Sukumaran. According to them, she had wedded one Nadarajan and thereafter she started living with their father Sukumaran, while R.S.A. No. 901/2010 3 her original husband was living. But, they admitted that they are the children born out of the said relationship between Sukumaran and Plaintiff. Thirdly, they contended that mother of Sukumaran was also living at the time of his death and the suit was instituted without impleading all the legal heirs of the Sukumaran and the suit is bad by non joinder of necessary parties. They further contended that the old house in the plaint schedule property had been renovated using Rs.40,765/- sent by the second defendant to the plaintiff from abroad during the year 1979-1983, so also he had constructed a compound wall and a gate expending Rs.6,200/-. As regards the new building, according to them, the two storied new building expending Rs.4,38,000/- was constructed by the second defendant alone with the consent and knowledge of the plaintiff and other defendants. Lastly, they contended that there exists 44 cents of land in joint possession, apart from the plaint schedule property and the suit was instituted excluding the said property and thereby the suit itself is bad for partial partition. Hence, they prayed for dismissal of the suit. R.S.A. No. 901/2010 4 3. The learned counsel for the Appellant contends that the learned Subordinate Judge had erred in allowing the appeal in part. The judgment and decree passed by the learned Sub Judge are illegal, perverse and unsustainable to the extent allowing the counter claim in part. The court below ought not have allowed the claim of Rs.40765/- which is said to have been spent for the renovation of the old building. In short the contention is that the first respondent is unlawfully enriched in as much as he gets the said building and land beneath, in addition to the share in the remaining land. The learned Subordinate Judge ought to have confirmed the judgment and decree passed by the trial court as such.

4. Per contra, the learned counsel for the first respondent advanced the arguments to justify the impugned judgment under challenge. According to him, the court below rightly allowed the amount which had been received by the plaintiff from the first defendant for renovation of the old building. In the absence of evidence to prove the contentions raised in the Original Suit, the court below concurrently found that the plaintiff is entitled to get 5/8th share in the plaint R.S.A. No.

901/2010 5 schedule property. According to him, at all points the judgment under challenge allowing the Appeal in part is justifiable.

5. Coming to the evidence on record it is seen that the plaintiff was examined as PW1 and Exts A1 and A2 were marked by plaintiff and the first defendant was examined as DW1 and Exts B1 to B3 were marked for the defendant. The trial Court rightly framed 4 issues. The main questions to be decided was whether the plaintiff is entitled for 5/8th share of the plaint schedule property and building on it and whether the second defendant is entitled to get Rs.40,765/- from the plaintiff as prayed for. Though the defendants claimed the right to adverse possession, absolutely no evidence had been adduced to prove the said contention. Therefore, in the absence of evidence, I also concur with the concurrent findings of the court below that the first defendant miserably failed to prove the said contention. Coming to the second contention that the plaintiff is not legally wedded wife of the deceased Sukumaran and earlier she was married by one Nadarajan, Exhibit B2 marriage certificate had been produced to prove the R.S.A. No. 901/2010 6 said contention. But, the plaintiff was not confronted with the said document and no witness was examined to prove the genuineness of the said document. The plaintiff had denied that she had married to anybody else. Under the said circumstances, the court below can be justified in rejecting the said contention particularly, in view of Exhibit B1 certificate issued by the Tahsildar, Attingal to show that the plaintiff was the wife of the deceased Sukumaran.

6. Though the defendant contented that at the time of the death of deceased Sukumaran his mother was also alive, no evidence was forthcoming to substantiate the said contention. No evidence could be adduced to prove that the mother of Sukumaran was alive at the time of death of Sukumaran to claim any share in the property. So also the defendant could not prove that any partible property was excluded from the purview of the suit. In the absence of documentary evidence to prove that any property belong to Sukumaran was left omitted by the claimants, it cannot be held that the suit is bad by non inclusion of all partible properties. R.S.A. No. 901/2010 7 7. The learned counsel for the appellant mainly stressed the point that the court below went wrong by allowing counter claim to realise Rs.40,765/- which is said to have been expended by D2 for renovating the

old house in the plaint schedule property. Coming to the pleading of the parties with respect to the said contention, it is seen that the first defendant claimed that he had given Rs.40,765/- to the plaintiff for renovation of the old building. In addition to that he had spent Rs.6,200/- for the construction of the compound wall. Going by the evidence it is seen that at the time of cross examination the plaintiff herself admitted that Rs.40,765/- was received by her from D2. So there is an admitted fact that the plaintiff received the above said amount. As per the written statement the said amount was spent for reconstruction of the old building. The plaintiff has no case that the said amount was utilized for any other purpose. But the trial court rejected the claim on the sole ground that the said claim was barred by limitation, I am of the opinion that the trial court went wrong by a finding that the said claim is a time barred one. It is to be remembered that the plaintiff herself admitted that the said amount was utilized for renovation of the old building which R.S.A. No. 901/2010 8 now stands allotted to the share of the plaintiff. It cannot be treated as a time barred debt as the same was spent for making improvements in the property. At the time of partition the claim for improvements cannot be held to be barred by limitation. The said amount was neither the money payable for money lent nor money lent under an agreement. The trial court further held that there is no agreement between the parties regarding the repayment of the said amount which was voluntarily given by the second defendant. As far as the property in co-ownership is concerned, if one of the sharer had made improvement for all the co-owners and each of the sharer is liable to contribute for the same. But, in the instant case there is no evidence to show that other sharers also had given any amount for the same and the plaintiff has no case that she has received any amount from the other co-sharers. When the improvement which was made by using the money is exclusively set apart in the share of the plaintiff, I am of the opinion that the court below can be justified in allowing the counter claim with respect to the said amount so long as the receipt of the said amount by the plaintiff stands admitted. Thus, I find no kind of illegality or impropriety in any of the R.S.A. No. 901/2010 9 findings and I do not find any kind of perversity in the appreciation of evidence from which those findings have arrived at. Hence, the second appeal is dismissed. K. HARILAL JUDGE DMR/-