

Thanku @ Another Vs. Ayyappan and Others

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Court : Kerala

Decided On : Aug-05-2015

Judge : Honourable Mr. Justice a.Hariprasad

Appellant : Thanku @ Another

Respondent : Ayyappan and Others

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.HARIPRASAD WEDNESDAY, THE 5TH DAY OF AUGUST 2015 14TH SRAVANA, 1937 RSA.No. 266 of 2011 () ----- AGAINST THE

JUDGMENT

AND DECREE IN AS1002003 of ADDITIONAL DISTRICT COURT (ADHOC), FAST TRACK COURT NO.1, THRISSUR DATED 28-06-2010. AGAINST THE

JUDGMENT

AND DECREE IN OS991999 of MUNSIFF COURT, WADAKKANANCHERRY DATED 27-09-2002. APPELLANTS/APPELLANTS/DEFENDANTS 1- 2: ----- 1. THANKU @ THANKAMANI, D/O CHATHA, NELLIKUNNU COLONY, VADAKKANANCHERRY VILLAGE, THALAPPILLY TALUK.

2. MALU, D/O.CHATHA, NELLIKUNNU COLONY,VADAKKANCHERY VILLAGE, THALAPPILLY TALUK. BY ADV. SRI.DILIP J.

AKKARA. RESPONDENTS/RESPONDENTS/PLAINTIFF,DEFENDANTS2TO7

----- 1.
1. AYYAPPAN, S/O CHATHA, NELLIKUNNU COLONY,(DIED) AKAMPADAM
DESOM, VADAKKANCHERRY VILLAGE, THALAPILLY TALUK. P.O
WADAKKANCHERRY, THRISSUR DISTRICT PIN- 680 623. (LRS IMPEADED
AS ADDL.R7 TO R11) 2. RADHA, W/O.LATE NARAYANAN, S/O.CHATHA, -DO-
-DO- 3. PRADEEP,S/O.LATE NARAYANAN, -DO- -DO- 4. PRASEEDA,
D/O.LATE NARAYANAN, (MINOR) -DO- -DO- 5. PRABI, D/O.LATE
NARAYANAN, (MINOR) -DO- -DO- 6. PRABITHA, D/O.LATE NARAYANAN,
(MINOR) -DO- -DO- (RESPONDENTS4TO6REP. BY GUARDIAN2D
RESPONDENT). RSA.No. 266 of 2011 () -2- ADDITIONAL
RESPONDENTS7TO11:

7. SAISIKUMAR, S/O AYYAPAN, NELLIKUNNATH S.K.NIVAS,
P.O.WADAKKANCHERY - 680 582.

8. SAJITHKUMAR, S/O AYYAPPAN, TEJAS HOUSE, AGAMPADAM,
KUMARANELLUR P.O, WADAKKANCHERY - 680 590.

9. SUNILKUMAR K, S/O AYYAPAN, AGAMPADAM, KUMARANELLUR P.O,
WADAKKANCHERY - 680 590.

10. SUDEERKUMAR, S/O AYYAPAN, S.K.NIVAS, AGAMPADAM,
KUMARANELLUR P.O, WADAKKANCHERY - 680 590.

11. SUVARNAKUMARI K, D/O AYYAPPPAN, GEETHALAYAM, MANISSERI
EAST, MANISSERI P.O, OTTAPALAM - 679 521. THE LEGAL HEIRS OF THE
DECEASED RESPONDENT NO.1 ARE IMPEADED AS ADDITIONAL
RESPONDENTS7TO11AS PER

ORDER

DATED67/2015 IN I.A13582015 IN RSA26611. ADDL R7 TO R11BY ADV.
SRI.P.JAYARAM R3 BY ADV. SRI.K.MATHEWS MATHAI. THIS REGULAR

SECOND APPEAL HAVING BEEN FINALLY HEARD ON0508-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: amk A.HARIPRASAD, J.

----- R.S.A No.266 of 2011
----- Dated this the 5th day of August, 2015.

JUDGMENT

Preliminary decree for partition passed by the trial court, which was affirmed by the lower appellate court is the subject matter of this regular second appeal.

2. Heard the learned counsel for the appellants (defendants 1 and 2) and the learned counsel for the respondents (plaintiffs). First respondent died. His legal heirs are impleaded in this appeal as additional respondents 7 to 11.

3. The question in this appeal is centered around Ext.A1 patta issued under Rule 9 of the Kerala Land Assignment Rules in the name of Chatha, S/o Chatha. Contesting respondents would contend that the person named 'Chatha' in Ext.A1 is his father whereas the appellants (contesting defendants) would argue that pattadar Chatha is their father. So the question to be resolved is whether the land was assigned in favour of the original plaintiff's father, who is the grandfather of the R.S.A No.266 of 2011 2 contesting defendants or to the father of the contesting defendants.

4. For understanding the case, a short genealogy may be considered : Original plaintiff's brother is the predecessor-in-interest of the contesting defendants. In other words original plaintiff is the paternal uncle of the contesting defendants. Name of contesting defendants' father is Chatha @ Appunni. Name of the original plaintiff's father was also Chatha. In the plaint it is contended that Ext.A1 assignment was given in the name of original plaintiff's father Chatha, whereas the contesting defendants would contend that the property was assigned to their father Chatha, who is the son of Chatha.

5. Learned counsel for the appellants contended that the courts below erred in appreciating the evidence correctly and decreed the suit without any legal basis. It

is indisputable that the deceased first respondent, being the sole plaintiff in the R.S.A No.266 of 2011 3 partition suit should have established his right to get partition. In order to claim partition he should have shown that the person named in Ext.A1 patta was his father. I have been extensively taken through the oral evidence and the documentary evidence. Learned counsel for the appellants contended that Exts.B3 and B4 would show that the contesting defendants' father was Chatha. Admittedly, son of another Chatha. Ext.B5 is a voters' list produced to show that contesting defendants' father Chatha was the son of Chatha. In order to prove that defendants' father Chatha had an alias name Appunni as revealed from Ext.A2, the contesting defendants produced Ext.B6 which is the certificate issued by the Village Officer. All these documents were admitted in evidence without any dispute.

6. Learned counsel for the contesting respondents contended that oral evidence given by PW1 (original plaintiff) has not been challenged by the oral evidence adduced by DW1. It is the submission that PW1 had asserted that his father Chatha R.S.A No.266 of 2011 4 was the acquirer of the property in Ext.A1. This contention is denied by DW1 deposing that her father Chatha obtained patta in the year 1970. It is also the contention of DW1 that her grandfather Chatha expired long before Ext.A1. In the written statement, it has been clearly pleaded by the contesting defendants that their grandfather died long before 1970. During the evidence, DW1 deposed that he died in 1965. It is true that when she was examined as DW1 she could not convincingly show that her grandfather Chatha died in 1965. However, it is to be seen that the burden was heavily on the original plaintiff (deceased first respondent) to show that his father Chatha was the person who accrued the property. In the absence of such evidence certainly the suit for partition cannot be allowed in favour of the plaintiffs (contesting respondents).

7. Payment of revenue by both sides assume no importance because all these payments were made on the eve of the suit. R.S.A No.266 of 2011 5 8. Ext.A1 patta was produced by the original plaintiff. The contesting defendants have an explanation for original plaintiff possessing Ext.A1. It is their case that immediately after the death of their father (original plaintiff's brother) he came to their house and informed the contesting defendants that he would take steps to mutate the

properties in their name, for which the patta was necessary. Believing his words, the patta was given to PW1 and in spite of demands he did not return the same.

9. The courts below erroneously found that the lacuna in the evidence of contesting defendants could be interpreted in favour of plaintiff to grant a decree for partition. I am afraid the approach taken by the courts below is not correct. The original plaintiff could succeed in the suit only if he established that the property was acquired through Ext.A1 by original plaintiff's father Chatha. Even though DW1 deposed that his grandfather was also another Chatha, no reliable evidence was adduced. R.S.A No.266 of 2011 6 Further, the original plaintiff failed to prove that his father Chatha died subsequent to 11-05-1970, the date of Ext.A1 document. In the absence of proving that Ext.A1 was issued in favour of DW1's father, the original plaintiff was not entitled to get any relief in the suit as burden was entirely on him to establish the partibility of the estate.

10. Learned counsel for the respondents requested for indulgence of this Court to remand the matter for affording an opportunity to him to prove that Ext.A1 was issued in the name of PW1's father Chatha and not in his brother's name.

11. Learned counsel for the appellants opposed this submission saying that enough opportunity had been given to them to prove the case. But I am of the view that both the courts below did not consider the legal issue involved in the suit correctly. I am not impressed with the contention raised by the respondents that the admission made by DW1 before the ex parte Commissioner, who went to the property for effecting R.S.A No.266 of 2011 7 partition in a final decree proceedings, was binding on him. Firstly, the Commissioner was not examined. Secondly, the Commissioner's purpose was not to record evidence. Thirdly, even if it is taken as an admission, it cannot be taken as waiver of a legal right in favour of the contesting defendants.

12. Considering the totality of evidence, I am of the view that the courts below committed a serious error in appreciating the evidence correctly and identifying the legal issues involved in the case. Therefore, in order to do substantial justice between the parties, I feel that the matter has to be remanded to the lower appellate court with the following specific directions : In the result, the regular

second appeal is allowed. Impugned judgment and preliminary decree passed by the lower appellate court are set aside. The matter is remitted back to the lower appellate court with a direction that it shall afford the plaintiffs (respondents) to adduce evidence to establish that Ext.A1 patta was issued in the name of Chatha who is the father R.S.A No.266 of 2011 8 of the original plaintiff. Certainly the contesting defendants are also entitled to adduce rebuttal evidence. It is made clear that the remand is a restricted remand solely for this purpose. After taking evidence, including oral evidence if any, the court below shall consider the matter afresh and dispose of the matter within a period of four months from the date of receipt of this judgment. The parties are directed to appear before the appellate court on 1st September, 2015. All pending interlocutory applications will stand dismissed. Sd/- A.HARIPRASAD, JUDGE. //True copy// P.A to Judge amk

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