Kamalam Vs. Devaki

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Court : Kerala

Decided On : Mar-24-2006

Reported in : AIR2006Ker248; 2006(2)KLT499

Judge : R. Bhaskaran, J.

Acts : Joint Hindu Family (Abolition) Act

Appeal No. : S.A. No. 116 of 1995

Appellant : Kamalam

Respondent : Devaki

Advocate for Def. : K.P. Dandapani, Adv.

Advocate for Pet/Ap. : N.L. Krishnamoorthy,; K. Lakshminarayanan and; D. Anil K

Disposition : Appeal allowed

Judgement :

R. Bhaskaran, J.

1. This second appeal is filed by defendants 1 and 3 to 5 in O.S. No. 94 of 1986 on the file of the Subordinate Judge's Court, Vadakara. The suit was for partition of plaint A and B-schedule properties and allotment of 1/10 share in plaint A-

schedule and 1/16 share in plaint B-schedule to the plaintiff. The suit was filed on the basis that the property described in plaint A-schedule belonged to the father of the plaintiff Pokkinan. He executed a Will on 25-9-1952 bequeathing the property in favour of the plaintiff and her children, who are defendants 6 to 8 and 11 to 15. According to the plaintiff, all the children of Pokkinan are entitled to equal share in plaint A-schedule property and therefore 1/10 share was claimed by the plaintiff. Plaint B-schedule property was admittedly set apart to the thavazhi of the plaintiff and her children as per partition deed of the year 1954 and the plaintiff prayed for partition of 1/16 share, defendants 1 to 15 being the other members of the thavazhi. Defendants 1 to 5 contended that as per the Will of the father, the bequest was in favour of the thavazhi of plaintiff and defendants and all the members of the thavazhi are entitled to equal share in the same. Defendants 6, 7 and 11 to 15 in their separate written statements supported the case of the plaintiff whereas defendants 8 to 10 contended that the bequest was in favour of the thavazhi of plaintiff and defendants. The trial court considered the question whether the property was obtained by the thavazhi under Will of Pokkinan or whether it was obtained by the children of Pokkinan as co-owners. On the wording of the Will, it was found that the property was to be enjoyed by the legatees as a thavazhi and not as co-ownership of the property. The 1st appellate court on the other hand held that only the children of Pokkinan were entitled to the shares and not the grand-children of the daughters of Pokkinan who were born prior to the commencement of the Joint Hindu Family (Abolition) Act. Therefore the short question that arises for consideration is whether the bequest is in favour of the named individuals or to the thavazhi of the plaintiff. The substantial questions of law formulated in the memorandum of second appeal on which notice was ordered read as follows:

a) When a bequest is made in favour of a natural group is there not a presumption that the bequest is in favour of a thavazhi.

b) What is the character of a bequest under the Will of deceased Pockinan.

c) When a Will contains wordings restricting alienation and joint enjoyment with right to persons to be born also does it not indicate the intention of the testator to

bequeath the property in favour of a thavazhi.

d) Whether the interpretation of the lower appellate court on the wordings in the Will is correct.

2. Ext. A1 is the Will executed by Pokkinan. It says that his wife pre-deceased him and the plaint schedule properties are to be enjoyed by his daughter and her children Kamalam, Divakaran and Rajendran and the children to be born to her in future. Defendants 1, 6, 7, 8 and 11 to 15 are the children of the plaintiff. The other defendants in the suit are the members of the thavazhi of the plaintiff and the children of the daughters of Pokkinan. They were impleaded in the suit as plaint B-Schedule property was allotted to the thavazhi of the plaintiff and defendants in an earlier partition.

3. Parties are admittedly Marumakkathayees of North Malabar. There is no dispute that the plaintiff and defendants constitute a thavazhi. Though at the time of execution of the Will all the children of plaintiff were not born, the Will provided a right in plaint A-schedule property to them also as it is stated that plaint A-schedule property was to be obtained by the plaintiff and the then existing children and the children to be born to the plaintiff. When the bequest is in favour of a natural group consisting of a woman and all her children, the presumption is that it enures to the benefit of the thavazhi. It is, no doubt, true that the word 'thavazhi' as such is not mentioned in the Will. In Narayani Amma v. Parameswaran Pillai 1963 KLT 630, the question arose whether a gift deed executed by two members of the tharavad in favour of a Marumakkathayee woman and her children would enure to the thavazi or not. The Division Bench consisting of Chief Justice M.S.Menon and Justice Govindan Nair held that there is a presumption that when a Marumakkathayee governed by the notions and concepts of the Marumakkathayam system of law executed a gift in favour of a Marumakkathayee, there is a presumption that the gift was to the thavazhi at least in so far as the Travancore area was concerned. Subsequently, a Full Bench of this Court in Seetha v. Krishnan 1975 KLT 156 (FB), the entire case law was discussed and it was held that there is a presumption in cases where the gift or Will was in favour of the members of a natural that it enured to the thavazhi constituted by that

group. That Devaki and all her children constituted a natural group cannot be disputed. The Will was executed in 1952. All the children of Devaki were not born at that time but the Will provided for them also to be benefited. Looking at the age of the children of Devaki,,it can be seen that all the daughters of Devaki were not bom at the time of execution of the Will. When the Will is in favour of a natural group, there is a presumption that it would enure to the benefit of the thavazhi. The trial court therefore found that all the members of the thavazhi are entitled to equal share and the property was directed to be partitioned accordingly.

4. The appellate court has gone wrong in stating that the word 'santhanam' in Thelungu word was used for lineal descendants and did not indicate the intention to benefit the thavazhi. In Narayani Amma's case (1963 KLT 630), the Division Bench has held that the expression 'santhathi' which corresponds to 'santhanam' means not children or issue only but imports succession or heirship. Before the Full Bench decision in Seetha's case 1975 KLT 156 (F.B.), another Full Bench in Janamma Pillai v. State 1974 KLT 750 (FB), has also taken the view that the property gifted by a person to his wife and children, in the absence of evidence to the contrary, is to be treated as thavazhi property of the donees. Therefore, the mere absence of.the word 'thavazhi' in the Will excuted by Pokkinan by itself will not show that the properties were to be enjoyed as co-ownership property. It is also to be noted that in 1954 a registered partition deed was entered into as evidenced by Ext. A2 wherein the plaintiff and her children obtained plaint B-schedule property as thavazhi property and the same is not in dispute. Therefore, the existence of a thavazhi consisting of the plaintiff and her children as early as in 1954 would itself show that when Pokkinan intended his daughter and all her children to be benefited by the Will, the intention was to benefit the thavazhi of Devaki and not the persons mentioned in the Will only.

In the light of the above discussion, the questions of law formulated in the memorandum of second appeal are found to be substantial questions of law and they are answered in favour of the appellants. The judgment and decree of the lower appellate court are therefore set aside and the second appeal is allowed. The trial court judgment and decree will be restored and there will be a preliminary decree for partition of plaint A and B-schedule properties into 16 equal shares and

one such share be allotted to the share of the plaintiff, five such shares jointly to the share of defendants 1 to 5, one such share to the 6th defendant, three such shares jointly to defendants 8 to 10, one such share to the 7th defendant and one such share each to defendants 11 to 15. The shares of defendants 1 to 5, 6 and 11 to 15 shall be allotted only on payment of court fee. The parties are directed to bear their costs in the second appeal.