

Devaki Antharjanam Vs. Narayanan Namboodiri

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Court : Kerala

Decided On : May-24-2006

Reported in : AIR2007Ker38; 2006(2)KLT1022

Judge : K.T. Sankaran, J.

Acts : [Family Courts Act, 1984](#) - Sections 7, 7(1), 8, 9, 10, 13 and 15; Code of Civil Procedure (CPC) - Order 32A; Kerala Land Reforms Act - Sections 125(3); Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : R.S.A. No. 729 of 2005

Appellant : Devaki Antharjanam

Respondent : Narayanan Namboodiri

Advocate for Def. : A.K. Seshadri, Adv.

Advocate for Pet/Ap. : Renjith Thampan and; P.A. Anitha, Advs.

Disposition : Appeal dismissed

Judgement :

K.T. Sankaran, J.

1. The first defendant challenges the final decree for partition. The plaintiff is the husband of the first defendant. The 2nd defendant is their son. The plaintiff and

first defendant has a daughter as well. They are Namboodiris. In the illom partition, the plaint schedule property and more extent was allotted to the plaintiff, first defendant and their children. As per a subsequent partition, the plaint schedule property was allotted to the plaintiff and defendants. Each of them has one third share in the plaint schedule property having an extent of 13.5 cents in which a residential building and a commercial building are situate. Preliminary decree declared their shares. The plaintiff filed the application for passing the final decree. A Commissioner was appointed. He submitted a plan, report and account. The trial court accepted the same and passed the final judgment and decree. The defendants unsuccessfully challenged the final judgment and decree before the District Court. Dissatisfied with the concurrent findings, the first defendant has come up in Second Appeal.

2. Sri. Ranjith Thampan, the learned Counsel for the appellant contended that the preliminary decree and the final decree are void in view of Section 7 of the Family Courts Act. He contended that the Family Court was established for the area and the presiding officer was appointed in 1995 much before the institution of the suit in 2002. The preliminary decree was passed on 25-7-2003 and the final decree was passed by the trial court on 30-6-2004 in an application filed in 2003. The present suit comes under Explanation (c) to Sub-section (1) of Section 7 of the [Family Courts Act, 1984](#) and therefore the civil court has no jurisdiction to deal with the suit. The decree passed in such a suit is void and non est. He also contended that the partition effected by the Commissioner is inequitable and unjust and the commercial building was not properly valued.

3. Sri.A.K. Seshadri, learned Counsel for the first respondent/plaintiff contended that the suit is not hit by Section 7 of the Family Courts Act. He contended that the 2nd defendant is a sharer and therefore, the suit does not come under Explanation (c) to Sub-section (1) of Section 7. Sri. Seshadri referred to the Commissioner's report and account and submitted that the partition suggested is just and equitable.

4. The following substantial questions of law are raised for consideration and they are dealt with as the points for consideration:

1. Are the preliminary decree and final decree void and passed without jurisdiction since the suit was instituted and the decision was rendered by the civil court after the establishment of the Family Court under the Family Courts Act ?
2. Is the partition by metes and bounds made as per the final decree just and equitable ?

Point No. 1:

5. Section 7 of the Family Courts Act reads (only relevant portion) as follows:

7. Jurisdiction:

(1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation:-- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely;-

(a) ...

(b) ...

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

6. Section 8 provides that where a Family Court has been established for any area, no district court or any subordinate civil court referred to in Sub-section (1) of

Section 7 shall, in relation to such area have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section. Section 8 also provides for transfer of such suits to the Family Court having jurisdiction.

7. What is the meaning of 'a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them'? Does that expression include a suit for partition in which apart from the parties to the marriage, other sharers are also parties? Does the expression 'property of the parties' mean 'property of the parties to the marriage' or the 'property of the parties to the litigation'? These questions are to be resolved in this case for the decision of point No. 1.

8. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. In the Objects and Reasons to the Act, it is stated:

Several associations of women, other organizations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

(emphasis supplied)

9. Section 7 indicates the nature of the suits and proceedings in respect of which the Family Court has exclusive jurisdiction. Section 9 mandates that the Family Court shall make efforts for settlement between the parties, of the disputes between them. Section 10 states that the provisions of the Code of Civil Procedure

shall apply to the suits and proceedings before the Family Court, subject to the other provisions of the Act and the Rules. Section 13 states that notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. However, the Family Court may seek the assistance of a legal expert as *amicus curiae*. In view of Section 15, it is not necessary for the Family Court to record the evidence of witnesses at length and it is enough to record a memorandum of the substance of what the witness deposes.

10. In *Krishnan Namboodiri v. Thankamani* 1994 (1) KLT 607, Justice Manoharan considered a similar question as involved in this case. The wife filed a suit for partition claiming one third share. The other sharers were the husband and the daughter. The husband contended that his sisters are also entitled to shares and they were impleaded as additional defendants in the suit. The husband prayed for transfer of the suit to the Family Court, after the establishment of the Family Court and contended that the civil court has no jurisdiction to try the suit. This court repelled the contentions of the husband and held that the civil court has jurisdiction to try the suit. It was held as follows:

Therefore, it is not enough that the suit is between the parties to the marriage; but the same should be with respect to the property of the parties or of either of them. Here, the subject matter of the suit belongs not only to the parties to the marriage, the plaintiff and the first defendant, but belongs to others also. In the context, it is necessary to remember that it is the contention of the first defendant-revision petitioner that his sisters are also entitled to a share. When contention is others are also interested in the subject matter of the suit like a suit for partition and they are also in the party array, simply because among the parties a husband and wife are also arrayed on rival side that cannot attract Clause (c) of Explanation to Section 7(1) of the Act.

11. In *Shyni v. George and Ors.* 1997 (1) KLJ 573, this Court considered the question whether the Family Court has jurisdiction to entertain a suit filed by the wife against the husband and father in law for recovery of amounts given at the time of marriage. This Court held that 'so long as the suit is by one spouse against

the other the suit would be maintainable in the Family Court even if for the purpose of seeking relief in respect of the cause of action put forward in the suit, the suing spouse is forced to implead persons other than the other spouse including the close relatives of the other spouse.' The following reasons are given for that conclusion:

In such a situation, the close relative of the husband or the stranger could only be the agent of the husband or a confidant of the husband holding the property claimed by the wife on behalf of the husband. It is not possible to accept the argument that in such a circumstance also the wife would be obliged to file the suit against the stranger in an ordinary civil court even while she is forced to maintain her suit against the husband in the Family Court. Would it make any difference if in a given case, the property of the wife was entrusted not merely to the husband but also to a close relative of the husband, in this case, the father-in-law? I think that it will be the very negation of the scheme of the Family Courts Act and the attempt made by that Act to constitute a special civil Court for the purpose of dealing with all matrimonial disputes including disputes about property to hold that the wife would not be entitled to maintain a suit for recovery of her property against the father-in-law in the Family Court. If it were merely a suit against the father-in-law it is quite clear that the suit could be instituted only in the ordinary civil court. Equally, if it is merely a suit against the husband for recovery of property, the same could only be maintained in the Family Court. In a case where the claims have to be combined or the same has to be made against both the husband and the father-in-law as in the present case, could it be said that the jurisdiction of the Family Court would stand ousted My answer is an emphatic no. The suit will remain as a suit against the spouse for recovery of the property of the wife.

12. In Shyni's case, Justice P.K. Balasubramanyan (as his lordship then was) referred to Krishnan Namboodiri's case and held thus, which is very relevant in this context:

According to me a suit for partition of that nature in which a party to a marriage claims a share in the property not only along with her husband or as against her husband but also along with various other members of the joint family would be

totally different from a case where the wife files a suit for recovery of her exclusive property against her husband and someone else who is holding the property on her behalf or who is holding it in trust for her like the father-in-law in the present case.

13. In *Abdul Jaled v. Sahida* 1997 (1) KLT 734, while answering in the affirmative the question whether a divorced wife could maintain a suit for partition before the Family Court against the former husband. Justice K.G. Balakrishnan (as his lordship then was) and Justice B.N. Patnaik held: 'If the declaration for partition was sought in respect of an item of property independently acquired by one of the parties after the dissolution of the marriage, certainly the Family Court may not have jurisdiction'. In respect of another proceeding before the Family Court between the same parties, the Supreme Court in *Abdul Jaleel v. Sahida*, 2003 (2) KLT 403 (SC) approved the view taken in 1997 (1) KLT 734. It was held by the Supreme Court thus:

The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.

14. The scope and ambit of Clause (d) of Explanation to Sub-section (1) of Section 7 came up for consideration in *Leby Issac v. Leena M. Ninan* : AIR2005 Ker285 . It was held that a suit filed by the husband for recovery of money as compensation from his wife and father-in-law is maintainable before the Family Court. Dealing with the object and purpose of the Act, it was held:

There are also various other special and significant provisions in the Act which are not available in any other enactments for the courts to arrive at an effective solution to the lingering problems of the victims of broken marriages. Those are all are intended to benefit the couples whose marriages are broken for reasons, either man-made or otherwise to obtain a quicker and final relief to their problems.

15. In *Kamalsanan v. Valsala* 1994 (1) KLT 737, the question involved was whether a suit is maintainable before the civil court at the instance of the daughter against the father for a declaration that the latter is bound to conduct the marriage of the former and also for mandatory injunction directing the latter to provide funds for the marriage. Justice Pareed Pillay (as his lordship then was) held that the suit is maintainable and that the Family Court has no jurisdiction to try that case. It was held:

Section 7 specifically mentions the limited area of the Family Courts. It has no power to transverse beyond its specified sphere of jurisdiction. Any matter not covered by Section 7 would definitely come within civil court's jurisdiction and merely because the relief sought in the plaint relates to marriage its jurisdiction is not taken off.

16. In *Suprabha v. Sivaraman* : AIR2006 Ker187 , the Division Bench referred to Leby Isaac's case and Kamalasanan's case. The question involved in Suprabha's case was whether a suit for return of value of the gold ornaments, cash paid and other valuables given at the time of marriage of the plaintiff with her since deceased husband, would be maintainable before the Family Court, against the parents of the husband. It was held that Clause (c) of the Explanation to Section 7 is not attracted, but Clause (d) applies. It was held thus: 'We are of opinion that in the context of Section 7(c) the meaning of the words 'parties to a marriage' cannot be given such a wide interpretation as to include all those who are interested in the welfare of the couple or those who take part to the marriage ceremony. Therefore, the suit or proceeding must be between the husband and the wife with respect to the property of the parties or either of them.' It was, however, held that the suit comes under the expression 'a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship', relying on the decision in Leby Isaac's case. The decision in Kamalasanan's case was neither overruled nor dissented from.

17. The property to be partitioned in the present case belongs not only to the plaintiff and his wife but also to their son. Therefore, in the strict sense, it cannot be said that the suit or proceeding is with respect to the property of the parties to

the marriage or either of them. Though a person other than the party to the marriage happens to be a party to the suit or proceeding before the Family Court, that by itself cannot be a ground to hold that it is not a suit or proceeding between the parties to the marriage. Decision on such questions depends on the facts of each case. There may arise a case where a person other than the party to the marriage may be made a party to the suit or proceeding- as a formal party; or as a party with whom the money or property of the parties to the marriage or either of them is entrusted; or as a person claiming through either or both the parties to the marriage; or as a legal representative of either party to the marriage; or as a person in possession of the property of either or both the parties to the marriage; or an adulterer in a proceeding for divorce; or a person who keeps custody of a minor. These are only some examples in which a person other than a party to the marriage may be arrayed as a party to the suit or proceeding. The examples are not exhaustive. The existence of a person other than a party to the marriage in the array of parties may not be a conclusive test to determine whether or not the suit or proceeding is 'between the parties to the marriage'.

18. A suit for partition implies existence of co-ownership rights of the sharers. They have pre-existing rights in the co-ownership property. Each sharer is entitled to claim his or her share. Such sharer need not necessarily be a 'party to a marriage'. A sharer other than 'a party to a marriage' may seek partition of his share against the other co-owners including persons who are 'parties to a marriage.' Existence of such parties to a marriage in the array of defendants/respondents is not a ground to hold that only the Family Court has jurisdiction. In a given case, the husband or wife may be arrayed as a party to the partition suit though he or she is not entitled to share, but his or her spouse has share, in order to make such other person, who is not a co-owner, bound by the decree. To my mind, there is a sure test which could be adopted in the present case. Could the 2nd defendant (son of the plaintiff and first defendant) File a suit or proceeding before the Family Court against the plaintiff and the first defendant claiming partition? I am of the view that he could not. The reason is that it would not be a 'a suit or proceeding between the parties to a marriage'. It may also be that there is no dispute between the husband and wife and they may jointly oppose the claim of the son. If so, how could it be said that the civil court has no jurisdiction to deal with such a suit? If the son files

such a suit for partition before the civil court, how could it be successfully contended that the civil court has no jurisdiction? Could it be said that if the husband or wife files the suit, it should be filed before the Family Court and if the son files the suit, it could be filed before the Civil Court? Certainly not. There cannot be different forum for filing the suit for partition depending on who files the suit. There may be cases for partition where there are several sharers; those sharers may include parties to a marriage. It may also be true that in such a case, there may be dispute between the parties to the marriage. That does not mean that the Family Court has jurisdiction to entertain and decide the suit, only on the ground that two of the parties to the suit consist of parties to a marriage. The disputes involved in a partition suit, may, sometimes, be complex. Different parties may set up different rights and may sometimes claim exclusive rights. Some of the parties may claim reservation or equity. Some may set up tenancy rights under the Land Reforms Act having been created in their favour or in favour of strangers. If the question of tenancy arises, it has to be referred to the Land Tribunal which has exclusive jurisdiction to decide the question of tenancy, in view of Section 125(3) of the Kerala Land Reforms Act. These are all matters for the civil court to decide and they do not come within the jurisdiction of the Family Court. If the property sought to be partitioned belongs to either or both the parties to the marriage and they are the only parties to the suit or proceeding, the Family Court would have jurisdiction to decide that suit or proceeding. But that is not the position where there are other sharers or persons claiming independent rights. The rights of the 2nd defendant in the present case are distinct and independent. Such rights are not dependent on the rights of his father or mother or of both. As a member of the illom, he has right by birth in the property.

19. The next question to be considered is what is the meaning of the expression 'with respect to the property of the parties' occurring in Explanation (c) to Section 7(1). Does it mean property of the parties to the proceedings or property of the parties to a marriage? The words 'or of either of them' following the expression 'with respect to the property of the parties' would unmistakably lead to the conclusion that the expression refers to parties to a marriage and not parties to the proceedings. In order to attract Clause (c), the litigation must be with respect to the property of either the husband or wife or both of them. It excludes any other

person who has independent rights in respect of the property. Could it be said that the co-ownership property of the husband, wife and son is the property of 'the parties to a marriage or either of them'? Evidently not. Therefore, I am of the view that the ingredients of Clause (c) of the Explanation are not attracted in the present case. It cannot even be contended that the present case is covered by Clause (d) to the Explanation to Section 7(1). Therefore, I am of the view that the civil court had jurisdiction to decide the suit and that the decree is not a nullity. I respectfully follow the decisions in *Krishnan Namboodiri v. Thankamani* 1994 (I) KLT 607 and *Kamalasanan v. Valsala* 1994 (1) KLT 737 and *Shyni v. George and Ors.* 1997 (1) KLJ 573. Point No. 1 is accordingly held against the appellant.

Point No. 2:

20. As per the final decree, the plaintiff was allotted plots A1 and A3 having a total extent of 4.370 cents. Plot A2 having an extent of 9.130 cents was allotted to the defendants. In plot A3 allotted to the plaintiff, there is a shop building. The residential house is in plot A2 which was allotted to the defendants' share. The commercial building has an area of 867 sq.feet and it faces the Irinjalakuda bus stand Koodalmanikyam road. The Commissioner valued the said building at Rs. 2,16,750/- The residential building has an area of 1157.77 sq.feet and it was valued at Rs. 2,51,550/-. There is entry from plot A2 to the public road situated on the western side. Plot A3, the commercial plot, having an extent of 1.150 cents was valued at Rs. 12,000/- per cent and the rest of the property was valued at Rs. 9,000/- per cent. As per the Commissioner's account, the plaintiff has to pay a sum of Rs. 60,066/- as owelty to the defendants, though the plaintiff was allotted a lesser extent of 4.370 cents as against 4.5 cents which would be his share if the land available for partition is divided as per the shares declared. The Commissioner has sought the assistance of an expert for the purpose of valuing the building. The valuation of the land is also properly made. The plaintiff is not being given any larger extent of land than that is legitimately due to him and therefore, the valuation of the land has no significance. The Commissioner has considered all relevant aspects. The allotment of plots suggested by the Commissioner is also just and reasonable. Above all, the 1st defendant-appellant has not adduced any evidence to prove the objections raised by her against the

Commissioner's report, account and plan. The courts below were justified in accepting the Commissioner's report, account and plan. I do not find any ground to interfere with the concurrent findings of fact arrived at by the court below. Point No. 2 is accordingly decided against the appellant.

In the result, the Regular Second Appeal is dismissed, but without any order as to costs.

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