

**Ouseph Vs. Alice**

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**Court :** Kerala

**Decided On :** Jun-03-2005

**Reported in :** 2005(4)KLT309

**Judge :** P.R. Raman and; K. Padmanabhan Nair, JJ.

**Acts :** Cochin Christian Succession Act, 1097 - Sections 9, 10, 17 and 18 to 23

**Appeal No. :** A.S. No. 71 of 1994

**Appellant :** Ouseph

**Respondent :** Alice

**Advocate for Def. :** K.G. Balasubramanyan,; N. Subramaniam and; M.S. Narayana

**Advocate for Pet/Ap. :** V. Sivaswamy,; V.V. Asokan,; K.I. Mayankutty Mather

**Disposition :** Appeal dismissed

**Judgement :**

**P.R. Raman, J.**

1. The above appeal is preferred by the 1st defendant in O.S.No. 412/1988 on the file of the Sub Court, Irinjalakuda. The suit is one for partition of the plaint schedule items and claiming 1/7 share in the said plaint schedule property. Admittedly, the

property belonged originally to one Thomman who died in the year 1941 corresponding to 1117 ME. His wife Mariyam also died subsequently in the year 1972, when the plaint schedule property originally belonged to the said Thomman. Thomman had 7 children. Kunjayyathi, Annam, Thressia, Kunhelia and Rossy are his five daughters whereas Ouseph and Devassy are two sons. Kunjayyathi, Annam, Thressia and Devassy died. Plaintiffs are the legal heirs of Thressia, daughter of Thomman. 7th defendant is the only legal heir and son of Kunjayyathi. The 12th defendant is another daughter by name Kunhelia and 13th defendant is Rossy. Defendants 2 to 6 are the legal representatives of deceased Devassy, the other son of Thomman. Defendants 8 to 11 are the legal heirs of deceased Annam. Plaintiffs are the children of Thressia (deceased) who was the daughter of Thomman.

2. The suit property consists of 2.281/2 acres in Sy.No. 410/3 and 413/3 in Kakkulissery Village. The suit was filed in 1988.

3. According to the plaint averment, the plaintiffs are entitled to 1/7 share in the property. Since Thomman died intestate, all his children including daughters are entitled for equal share in the property. Before the court below it was admitted by the parties that the succession to the properties of the deceased Thomman is to be governed by the provisions of Cochin Christian Succession Act (Act 6 of 1097). It was also contended in the plaint that the 1st defendant was in possession as a co-owner of the property and is in joint possession with that of the plaintiff and other co-owners. It is also pleaded that they were visiting the property and obtaining their shares of income from the property. It was however contended by the contesting defendants that the plaintiffs being the daughters of Thressia, are not entitled to any share as Thressia was given 'Sthreedhanam' property. It was also contended that if at all there is any right in favour of the plaintiffs, the same is lost by ouster and adverse possession. It was the contention of the 1st defendant that subsequent to the death of Thomman, Mariyam, Ouseph and Devassy (mother and two sons) entered into a partition deed Ext.B2. There is a specific recital contained therein that the daughters have been given 'Sthreedhanam' and therefore the only heirs entitled to the share in the property of Thomman are the wife and two sons. Wife of Thomman was given right to live with either of the sons

and the entire property was divided between the two sons (Ouseph and Devassy) and thereafter they were in continuous and uninterrupted possession to the exclusion of all others and they were also taking profits from their respective shares in the property. Hence, according to them, whatever right if any the plaintiffs had over the property is lost by ouster and adverse possession. The court below repelled the contention raised by the defendants. Aggrieved thereby the 1st defendant has preferred this appeal. Though defendants 2 to 6, who are the legal representatives of deceased Devassy, who stepped into the shoes of Devassy, contested the matter along with the 1st defendant and have filed the cross-objection herein, when the matter was taken up, the learned Counsel Sri N. Subramaniam appearing on behalf of the cross objectors submitted that in view of the subsequent developments, the cross objection is not pressed. Accordingly, we dismiss the cross objection as not pressed.

4. Coming to the appeal the main contention urged on behalf of the appellants by the learned Counsel Sri Asokan is that the plaintiffs, who are the legal heirs of Thressia are not entitled to any share in the property, since Thressia was given 'Sthreedhanam' property and he strongly relied on the statements contained in Ext.B2 to support his contention and that if at all there is any right in favour of Thressia, the same is lost by ouster and adverse possession.

5. Admittedly, Thressia was not married during the life time of Thomman. It is also the case of the appellant that if any property is given or contracted to be given by way of Sthreedhanam during the life time of Thomman that will disentitle the daughter to claim any share in the property of the deceased father thereafter and according to him, at any rate there is any evidence to show that Sthreedhanam was contracted to be given to Thressia by Thomman. It was contended that in Ext.B2 partition deed of the year 1968 there is a solemn declaration by the mother that Thressia was also given in marriage after giving Sthreedhanam and Ext.B2 was accepted by other daughters. According to him, this solemn declaration made by the mother is sufficient to show that the plaintiffs are not entitled to any share, since Thressia was given Sthreedhanam at the time of her marriage. We are unable to accept this contention for the following reasons:

6. Admittedly Thomman died in the year 1941 and the right to succession opens as on the date of his death. This is a settled principle. Since there is no dispute that the property will devolve on the legal heirs in accordance with the provisions contained in Cochin Christian Succession Act, we need only refer to the relevant provisions contained therein so as to answer the contention now put forth by the appellant. As per Section 9, a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. As per Section 10, such property devolves upon the wife or husband or upon those who are of the kindred of the deceased, in the order and according to the rules herein prescribed. The prescription is contained in Section 17 in Part III of the Act, which provides for rules for distribution of the intestate's property (after deducting the widow's share if he has left a widow) among his lineal descendants as per subsequent provisions as enumerated in Sections. 18 to 23 of the Act. There is no dispute that but for the exclusion contained in Section 22 the plaintiffs would also be entitled to share in the property of the deceased Thomman, who died intestate. The question therefore arises for consideration is as to whether in the present case the plaintiffs are excluded from the distributive share of the property by virtue of Section 22 of the said Act. For the purpose of convenience, Section 22 is extracted hereunder:

'Exclusion of woman who has received Streedhanam: - Notwithstanding anything in the foregoing provisions of this Act, when a Streedhanam has been given or contracted to be given by the father, mother, paternal grandfather or the paternal grandmother, of a woman, to or in trust for her, neither the said woman nor any lineal descendant of hers as such, shall be entitled to a distributive share in the property of any of them dying intestate, if (1) a brother of the said woman, being a lineal descendant of the intestate, or (2) the lineal descendants of such a brother, survive the intestate.'

7. On a combined reading of the above provision it can be seen that when Streedhanam has been given or contracted to be given by the father, mother, paternal grandfather or the paternal grandmother of a woman, to or in trust for her, neither the said woman nor any lineal descendant of hers as such, shall be entitled to a distributive share in the property of any one of them dying intestate. Since

Thomman was the father, who died intestate, the rule of exclusion contained in Section 22 will apply, if Sthreedhanam has been given or contracted to be given by Thomman. Since the plaintiffs' mother was not married during the life time of Thomman, the question of giving any Sthreedhanam at the time of marriage during the life time of Thomman did not arise. However, according to the appellant, father has contracted to give Sthreedhanam in which case also Section 22 exclusion will apply. There is absolutely no material on record to show that there was any contract by the father to give any Sthreedhanam to the plaintiffs' mother and the only piece of evidence, based on which the contention is raised, is Ext.B2 partition deed between the mother and the two sons. It is hardly sufficient to show that Thomman had contracted to give any Sthreedhanam to his daughter, namely, plaintiffs' mother. Even if any Sthreedhanam is actually given by the mother or any of the sons, subsequently at the time of marriage of the plaintiffs' mother that will not disentitle the plaintiffs' mother from claiming any distributive share in the property. In this connection we may refer to two Bench decisions of this Court on the point. In Ouseph v. Saramma (1980 KLT SN -51- Case No. 110) it was held thus:

'Under Section 22 a woman becomes disentitled to get a share in the property of the four specified relations in cases they die intestate, only if Sthreedhanam has been received from any of them.'

(Emphasis given by us)

8. In that case it was found that -there is no evidence that Sthreedhanam which was received by the plaintiff was from any of the four persons mentioned in the section. Marriage itself took place long after the death of father. Succession to the properties of the father opened, the moment he died. Since before the date of the death of the father, no Sthreedhanam had been given, it was held that the plaintiff was not disentitled to get her due share in the properties of her father. Her subsequent marriage and receipt of Sthreedhanam were held to be not sufficient to divest her of the share which had already become hers. That does not mean that it is not open to her to receive amounts either as Sthreedhanam or otherwise from the estate of the deceased and relinquish her rights therein. Subsequently, in

Joseph v. Mary (1988 (2) KLT 27) also another Division Bench of this Court restated the principle and held thus:

'If Sthreedhanam was paid to a woman by any of the four relations specified in Section 22, and a brother or lineal descendant of the brother of the woman is alive, the woman will be excluded from inheritance of the said four persons by her brothers or lineal descendants of brothers. In the instant case, admittedly no Sthreedhanam was paid before the death of the father in 1944. The marriage of the plaintiff was in 1950. In the circumstances, the payment of Sthreedhanam subsequently will not disentitle her to claim her share in the property left behind by her father since succession opened on the death of her father in 1944.'

9. The above rulings of this Court and on a combined reading of the provision and in the absence of any evidence to show that there was any contract made out by the father, one of the four persons referred to in Section 22, to give Sthreedhanam to the plaintiffs' mother during his life time, we have no hesitation to hold that the view taken by the court below is only to be upheld and the plaintiffs' cannot be held to be disentitled to claim any share in the property of the deceased grandfather, who died intestate.

10. The next contention advanced by the learned Counsel for the appellant is that the right if any of the plaintiffs is lost by ouster and adverse possession. Admittedly, the 1st defendant is only a co-owner of the property. Even though it is asserted in the written statement that he was in continuous possession of the property for a long period, such assertion of possession by itself has no evidence or proof of ouster or adverse possession. It is settled position that the co-owner in possession of the property holds any interest for others and his possession is on behalf of the co-owners. In Kunhunni v. Kesavan Namboodiri (1990 (2) KLT 854) it was held by a Division Bench of this Court that though non-participation in the income for fairly a long period is evident in this case there is no other circumstances to support the possibility of an inference being drawn that there has been ouster. Mere non-participation by itself in the absence of any other circumstances, may not be sufficient to enable the court to hold that there is ouster. There was also 'a case that the plaintiffs specifically claimed past profits for

a period of three years on the basis that profits had been paid till then which was rebutted in the written statements. It was asserted on behalf of the defendants that for nearly 30 years plaintiffs had never come to the Illom and had never participated in the income. It was found that the first plaintiff left the Illom in his youth in search of other avenues of employment and settled down at a place within the same District and raised his own family. Because he was able to find other avenues of earning income he did not bother to trouble the co-owners residing in the Illom. There is no evidence that plaintiffs ever demanded share of income and that was refused by the contesting defendants. It was held that in the absence of anything to indicate that the contesting defendants, apart from merely collecting income from the property and spending the same, ever attempted to exhibit a hostile animus. Though non-participation in the income for fairly a long period was evident in that case, in the absence of any other circumstances to support the possibility that there has been ouster, said plea was repelled. It was further held that mere non-participation by itself in the absence of any other circumstance, may not be sufficient to enable the court to hold that there is ouster. The 1st defendant in the written statement was not able to adduce evidence to support the contention that the plaintiff was disentitled to a share in the property by the principle of ouster and adverse possession.

11. We find that when the 1st defendant is a co-owner of the property, it is his burden to establish that there was an ouster or adverse possession, as pleaded. In the present case we find that there is hardly any evidence to support the contention that there is any ouster as pleaded by the appellant/1st defendant. In the circumstances, we repel this contention as well and confirm the view taken by the court below.

No other points were argued. Accordingly, the judgment and decree of the court below is confirmed and the appeal is dismissed. However, in the circumstances of the case/the parties shall bear their respective costs.