

**Devu, Calicut and Others Vs. Pretha, Kozhikode**

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**Court :** Kerala

**Decided On :** Jan-20-2012

**Judge :** V. Ramkumar & K. Harilal

**Appeal No. :** A.S. No. 545 of 1999

**Appellant :** Devu, Calicut and Others

**Respondent :** Pretha, Kozhikode

**Judgement :**

**Ramkumar, J.**

1. The plaintiffs in O.S.No.232/1998 on the file of the Subordinate Judges' Court of Kozhikode are the appellants in this appeal. The said suit was one for partition and separate allotment of 6/12 shares of the plaintiffs over two items of immovable properties situated in Kozhikode. Item 1 is admeasuring 24 cents and item 2 has an extent of 83 cents. Both the properties are within the limits of Calicut Corporation.

2. The suit was resisted by the defendants contenting, inter alia, that the suit was barred by res judicata and Order II Rule 2 C.P.C.

3. The court below framed six issues for trial. Out of those issues, issue No.1 was whether the suit was barred by res judicata in view of the dismissal of an earlier suit O.S.No.164/1979. The 2<sup>nd</sup> issue was whether the plaintiffs have any right to

obtain partition as prayed for. Issue Nos.1 and 2 were decided as preliminary issues against the plaintiffs. In view of the findings recorded on those issues on 10.11.1998, the court below did not pronounce upon the rest of the issues and the suit was accordingly dismissed with costs as not maintainable. Hence this appeal by the plaintiffs.

4. We heard Advocate Sri.C.K.Ramakrishnan, the learned counsel appearing for the appellants/plaintiffs and Advocates Sri.T.Sethumadhavan and Smt.Karthika appearing for the contesting respondents.

### **ARGUMENT OF THE APPELLANTS**

5. The learned counsel for the appellants made the following submissions before us in support of the appeal:- The first suit namely O.S.No.164 of 1979 on the file of the Sub Court, Kozhikode was not only filed by the present plaintiffs but also by Leeladharan one of the brothers of plaintiffs 2 to 6. That apart, in that earlier suit right was claimed under Imbichi the plaintiffs' ancestor whereas in the present suit right to partition was claimed after the death of Kuttipennu, the widow of Imbichi, in the year 1971. Since the title under which the earlier suit was filed and the parties were also different, the court below was not justified in holding that the judgment and decree in O.S.No.164 of 1979 operate as res judicata to the present suit. Likewise, the causes of action for the earlier suit as well as the present suit being different, the principle on Order II Rule 2 C.P.C has no application. The contention of the defendants that Kuttipennu under whom the plaintiffs claimed did not have actual physical possession of any property and therefore she could not be said to have "possessed" any property within the meaning of Section 14(1) of the Hindu Succession Act, 1956 cannot be supported in the light of the decisions in ***Mahesh Chand Sharma Vs. Raj Kumari Sharma***, (AIR 1996 SC 869), ***C. Maisilamani Mudaliyar Vs. Idol of Sri. Swaminathaswami Swaminathaswami Thirukoli and others***, (AIR 1996 SC 1697) and ***Pachu Vs. Chirutha***, 2003 (1) KLT 241. The court below was not justified in relying on the finding in Ext.B1 judgment that since Imbichi died on 1921, that is, prior to the coming into force of Hindu Women's Rights to Property Act, 1937, she had no right to be maintained from out of her husband's estate. The decision reported in ***Raghubar Singh and others Vs. Gulab***

***Singh and others***, (1998) 5 Supreme 399 will go to show that the right of a Hindu widow to be maintained from the estate of her husband was not recognised for the first time under the Hindu Women's Rights to Property Act, 1937, but even under the pristine Sastric Law. All that apart, the appellants have filed I.A.No.2719/2003 in this appeal to amend the plaint so as to base their claim to partition through Gopalan and Sekharan, who were two of the sons of Imbichi and Kuttipennu and who died in the year 1933 and 1924 respectively. Since the parties are Thiyyas of Calicut governed by the Makkathayam law of Inheritance, on the death of Imbichi, his rights devolved on his sons Gopalan and Sekharan to the exclusion of his daughters and therefore the half-right of Imbichi over the suit properties should have been allotted to the plaintiffs. The court below has abdicated its function by refusing to record its findings on the other issues. It was mandatory for the lower court to have pronounced on all the issues in view of Order XIV Rule 2 C.P.C.

### **JUDICIAL EVALUATION**

6. We are afraid that we find ourselves unable to accept the above submissions made on behalf of the appellants. For a better understanding of the devolution of rights it may be necessary to refer to the genealogy appended to the plaint and in respect of which there is no dispute between the parties except regarding the year of death of Imbichi and the suppression by the plaintiffs about Gopalan and Sekharan, the sons of Imbichi. The following is the said genealogy:-

"Chart"

7. The plaint schedule properties which are two items of immovable properties were the joint acquisitions of two brothers Imbichi and Kelu as per Ext.A2 Kanam Kychit dated 08.02.1920. Both Imbichi and Kelu were Thiyyas of Calicut governed by the customary law known as Makkathayam (See ***Kelukutty and others Vs. Mammad and others***, (1972 KLT 725 (SC))). The Law of Inheritance of Thiyyas is not the 'Hindu Mithakshara Law' as such, but such law modified by custom and in the absence of proof of custom it is the Hindu Mithakshara Law which applies *qua* any custom set up (See ***Kannan Vs. Lakshmi***, (1970 KLT 731)).

8. Eventhough the plaintiffs in the present suit contended that Imbichi died in the year 1939, it is now fairly conceded that Imbichi in fact died in the year 1921 as was found in Ext.B1 judgment rendered in the earlier suit in which the 1st plaintiff herself conceded that it was in 1921 that Imbichi died.

9. Kelu died in the year 1943. Kuttipennu, was the widow of Imbichi (brother of Kelu) and she died in the year 1971. Imbichi and Kuttipennu had two sons by name Gopalan and Sekharan and two daughters by name Devu (1st plaintiff) and Kaarthi. Gopalan and Sekharan had died unmarried at a very young age in the year 1933 and 1924 respectively. Kaarthi also died in the year 1977. Plaintiffs 2 to 6 are the children of Kaarthi, the daughter of Imbichi. Besides plaintiffs 2 to 6, Karthi had a son by name Leeladharan, who died unmarried after 1981. Kalyani, the wife of Kelu had predeceased him. When Kelu died in the year 1943, he had left behind two sons by name Kumaran and Achuthan and three daughters by name Kumaran Achuthan, Chiruthakutty, Thirala and Kalyani. Kumaran died unmarried in the year 1974, Achuthan in the year 1976 and Kalyani in the year 1987. One Padmavathi was the widow of Achuthan and the 1st defendant Preetha is the daughter of the said Achuthan (son of Kelu). Chiruthakutty died unmarried in the year 1995. Defendants 7 and 8 are the children of Thirala and defendants 2 to 6 are the children of Kalyani, the daughter of Kelu.

10. O.S.No.164/1979 was a suit filed by the very same plaintiffs and Leeladharan the brother of plaintiffs 2 to 6 seeking partition and separate possession of their half share over the very same properties claiming that the half share of Imbichi who died in the year 1921 devolved on the said plaintiffs and that the descendants of Kelu, who were the defendants in that suit, were entitled to the remaining half share. That suit was resisted by the defendants therein contending, inter alia, that on the death of Imbichi in the year 1921 his half right over the property reverted to his brother Kelu and his children and that the plaintiffs were not entitled to any share over the properties. During the stage of trial of the said suit, the plaintiffs therein conceded the above position contended by the defendants therein but the plaintiffs changed their stand to contend for the position that on the death of Imbichi in the year 1921 his widow Kuttipennu had the limited estate of maintenance right over the properties and that the said right ripened into a full right

under Section 14(1) of the Hindu Succession Act, 1956, since Kuttipennu died in the year 1971, that is, long after the commencement of the Hindu Succession Act. Ext.B1 is the judgment dated 31.08.1981 in the said earlier suit O.S.No.164/1979. Dealing with plaintiffs contention that Kuttipennu had a limited estate which had blossomed into a full right, the learned Sub Judge held that since Imbichi died in the year 1921, that is long prior to the commencement of the Hindu Women's Right to Property Act, 1937, she had no right of maintenance at all and therefore there was nothing to be ripened into a full right by virtue of Section 14(1) of the Hindu Succession Act. The said suit was accordingly dismissed. It is the said dismissal of the said earlier suit which was put forward by the present defendants as operating as res judicata to the present suit. In the light of the finding in Ext.B1 suit that the right of a Hindu widow was recognized for the first time only after the coming into force of Hindu Women's Rights to Property Act, 1937 and since Imbichi died in the year 1921, his widow Kuttipennu did not have any such right which could have ripened into a full right, it is no more open to the plaintiffs to contend for the position that even prior to the coming into force of the Hindu Women's Right to Property Act, 1937, Kuttipennu had a right of maintenance recognized by the pristine Sastric Law and the said right could blossom into a full right under Section 14(1) of the Hindu Succession Act. No doubt, relying on **RaghubarSingh's** case (supra) the plaintiffs could have assailed Ext.B1 judgment to contend for the position that the Hindu Widow's right to maintenance was not traceable only to the Hindu Women's Right to Property Act, 1937 but to the pristine Shastric Hindu Law. But that was not done. They allowed Ext.B1 judgment to become final. It is well settled that even an erroneous decision operates as res judicata. (See ***MohanlalGoenka Vs. Binoy Krishnan***, (AIR 1953 SC 65). That apart, going by the decisions reported in **ErammaVs. Veerupana**, (AIR 1966 SC 1879), **DindayaVs. Rajaram**, (AIR 1970 SC 1019), **VaijaVs. Thakorbhaj**, (AIR 1979 SCC 993) and **Ram Vishal Vs. Jagan Nath**, (2004) 9 SCC 302, it is a pre-existing right coupled with possession alone which can attract Section 14(1) of the Hindu Succession Act and it is such right coupled with possession which can blossom into full right. The right of a Hindu widow is only to be maintained from out of the income of the joint family properties of which her deceased husband was a sharer. She has a charge too on such property. But that does not mean that she

has a right to possession of joint family properties nor is she a coparcener entitled to claim possession along with the other members. She had no right to demand partition of joint family properties as well. Thus, a Hindu widow who had no possession over the joint family property at all will not be entitled to claim full ownership by recourse to section 14(1) of the Hindu Succession Act. In regard to the charge of a Hindu widow over the properties of the reversioners, till her right to get maintenance from, her husband is legally enforced, the property of her husband cannot automatically become the subject matter of the charge for maintenance payable to the wife at a future point of time. Since the learned Sub Judge in the earlier suit had specifically found that Kuttipennu had no right of maintenance prior to the commencement of the Hindu Womens Rights to Property Act, 1937, it is not open to the plaintiffs to re-agitate their contention that Kuttipennu had a limited estate which had blossomed into absolute right under Section 14(1) of the Hindu Succession Act. The test of res judicata is the identity of title in the two litigations (See **RajLakshmi Vs. Banamali Sen**, (AIR 1953 SC 33) and **Khalid Vs. Sulekha**, (1986 KLT 1113 (FB))). In that view of the matter the court below was fully justified in holding that the present suit is barred by res judicata. When there is a bar of res judicata, there is a statutory interdict on the court against trying the very same issue in the subsequently instituted suit between the very same parties. It is true that Leeladharan, who was one of the plaintiffs in O.S.No.164/1979 is not a party to the present suit. But that does not make any difference, particularly when Leeladharan died unmarried after the disposal of the earlier suit and he was, therefore, not available to join the plaintiffs. If the issues, in the two suits were the same, the fact that in the first suit or in the second suit there were some other parties as well or that the reliefs prayed for in the 2 suits were different will not prevent the application of the doctrine of res judicata (See **Ishwardasv. State of Madhya Pradesh**, (AIR 1979 SC 551).

11. No doubt, Order XIV Rule 2 C.P.C is to the effect that the court should pronounce judgment on all the issues. But sub rule (2) of the said provision carves out an exception in a case where the whole case or any part thereof can be disposed of on an issue of law only in which case the court is empowered to try that issue alone first and if that issue relates to a bar to the suit created by any law for the time being in force, the court is entitled to decide that issue and dispose of

the suit itself in the light of the findings on that issue. Hence, the court below cannot be faulted in not deciding the other issues. When the trial of the main issue itself is barred, it would have been an unnecessary exercise for the court below to have recorded findings on the other issues. For that reason, we are not inclined to accede to the prayer of the appellant to remand the case to the court below for deciding the other issues.

12. In this appeal the appellants have filed I.A.No.2269/2003 seeking amendment of the plaint so as to base their claim for partition not as the descendants of Kuttipennu but as the descendants of Gopalan and Sekharan. The suit was filed on 10.05.1998. This is the second round of litigation. In the first round of litigation they filed the suit claiming under Imbichi. At the stage of evidence they altered their stand so as to claim under Kuttipennu. In the present suit their claim was as the descendants of Kuttipennu. 5 years thereafter they have sought an amendment of the plaint so as to claim under Gopalan and Sekharan. Apart from the fact that they cannot be allowed to go on shifting their stand, even if the proposed amendment is allowed, it will not improve their position. They have admitted in the amendment application that Gopalan and Sekharan died in 1933 and 1924 respectively. If so, on the death of Gopalan in the year 1933, their fractional rights, if any, over the properties would revert to the coparcenary consisting of Kelu and his two sons Kumaran and Achuthan all of whom died only long thereafter. It is well settled that the parties being governed by the Makkathayam law of inheritance, descent is only through the male heir. After the death of Gopalan and Sekharan, neither Imbichi nor any male descendant of Imbichi was alive so as to, prevent the properties reverting to Kelu and his male descendants. For that reason also the belated claim made through Gopalan and Sekharan also should fail. We, therefore, do not find any good reason to allow I.A.No.2269/2003 which is accordingly dismissed.

13. The result of the foregoing discussion is that the findings recorded by the court below do not warrant any interference at the hands of this Court. The present suit was rightly held to be barred by res judicata.

This appeal is accordingly dismissed. However, having regard to the facts and circumstances of the case, the parties are directed to suffer their respective costs.

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