

IN THE HIGH COURT OF THE STATE OF TRAVANCORE-COCHIN AT ERNAKULAM.

Present:-

*The Hon'ble Shri K.T. Koshi, Chief Justice
and
The Hon'ble Shri N. Varadaraja Iyengar, Judge.

A.S. No. 26 of 1954.

O.S. No. 120 of 1122 of the Anjikaimal District Court.

Appellant:- Plaintiff.

Mariam, wife of Mampilly Variath Ouseph, residing at Narakkal
Muri, Narakkal Village, Cochin-Kanayannur Taluk.

By Advocate Shri T.M. Mahalingam Iyer.

Respondents:- Defendants.

1. Kunhu Varkey son of Kurisumittathu Mampilly Kochu Variath
residing in Pulikkaparamba, Eravoor Desom, Nadama Village,
Cochin-Kanayannur Taluk.
2. Mariam, the wife of No. 1, died. Her children and heirs
being Annamma, residing in do. do.
3. Minor Pappul brother of No. 2, residing in do. do. by
guardian ad litem, the Nazir of the Anjikaimal District Court.
4. The heirs of the deceased Kochu Kunjan of Puthanparambu,
Nadama Desom, Nadama Village, Cochin-Kanayannur Taluk, being
his widow, Koma, residing in do. do.
5. Paru, daughter of No. 4, teacher in the Mangayil School,
residing in do. do.
6. Annamma, wife of Olikkal ^{Palli} Palli, do. Desom, do. Village, do. Taluk.
7. Mariam, daughter of No. 6 and wife of Thalasseri Ouseph resid-
ing in Kumbalam Desom, Kumbalam Village, Cochin-Kanayannur Taluk.
8. Aeli, daughter of No. 7 and wife of Thevarakkattu Ouseph, re-
siding in Thevara Desom, Ernakulam Village, do. Taluk.
9. Kuruvila, son of Villangattil Kochu Ouseph, residing in Nadama
Desom, Nadama Village, Cochin-Kanayannur Taluk.
10. Mariam, wife of Ouseph, residing in Nadumpurathu Palathingal,
Ponithara Desom, Ponithara Village, Cochin-Kanayannur Taluk.

By Advocate Shri N. Kumaran Achen for Respondent 1.

This Appeal Suit having been finally heard on 8-6-1956, this
court on 18-6-1956, delivered the following:-

(Koshi, C.J. and Varaderaja Iyengar, J.)

A.S. No. 26 of 1954.

J U D G M E N T.

Delivered by Koshi, C.J.

This is a plaintiff's appeal. The lower court has passed a preliminary decree for partition declaring that the plaintiff is entitled to two-third share of the plaint properties. She claimed a one-third share in her own right and another one-third as assignee of the rights of a deceased sister. Defendant 2, since deceased, was the other sister and defendants 1, 3 and 4 represent her interests. The plaintiff and her two sisters were the sole heirs to the properties of their mother, Kochu Mariam.

In the appeal the only point pressed before us on behalf of the plaintiff-appellant was that her claim to a two-third share of the past profits ought not to have been disallowed by the lower court. According to her past profits constituted a partible asset of the family and as such as in the case of the immovable property she was entitled to a two-third share of it. Though before the lower court and in the memorandum of appeal to this Court such share was claimed in the profits commencing from 1107, the year of the death of the mother, in the argument the claim was limited to the share of the profits for six years immediately preceding the suit. The lower court has allowed the plaintiff to realise her share of the profits from the date of the institution of the suit. Mr. Mahalinga Iyer appearing for the plaintiff-appellant contended that the view taken by the lower court that past profits cannot be allowed to the plaintiff

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inasmuch as there was no prayer in the plaint for accounting of the profits received by the co-owner-in-possession and recovery from her or her estate cannot be sustained. For the purpose of this appeal it is unnecessary for us to consider whether the lower court's view is right or not. The above is but one of the reasons mentioned by the learned Judge to negative the plaintiff's claim for past profits. Issue (iv) related to the question of past profits, issue (vi) related to the value or cost of improvements effected by the co-owner-in-possession and issue (ix) to the plaintiff's contribution towards common debts discharged by the co-owner-in-possession. The question raised by these issues have been considered together. In disposing of the claim of the co-owner-in-possession for value or actual costs of the improvements effected during the period of such possession, towards the concluding part of paragraph 13 of the judgment the learned Judge ^{has} stated:-

"But as co-owners in actual possession and in actual receipt of the income, if they made any improvements, it has to be presumed they made it for the benefit of all the co-owners and subservient to their rights. It has to be remembered that the co-owners who were not in actual possession were not being given any share in the income. Under the circumstances the claim for value of improvements raised by defendants 1 to 4 cannot be allowed." Again in determining the quantum which the plaintiff has to contribute towards common debts discharged by defendants 1 to 4 the learned Judge has stated:- "In fixing the amount which defendants 1 to 4 are entitled on accounts of the liability they discharged in respect of the expenses for the funeral of Kochumariam, it has to be remembered that they were appropriating the profits of the property. Taking that fact into consideration, the defendants cannot be given credit for any interest on the Rs. 1000/- which has been spent for the funeral.

..... Defendants 1 to 3 and 4 are entitled to a charge over the plaint schedule properties to that extent and for 5% interest on that from the date of suit.

The discussion on the issues referred to above is concluded by the learned Judge thus:- "Defendants 1 to 3 and 4 are not entitled to any value of improvements. They are entitled to a charge over the properties to the extent of Rs. 1058-1-1 and interest thereon from date of suit at 6%. The plaintiff is not allowed to recover any share in the profits of the properties till date of suit. She is entitled to a 2/3 of the profits from the date of suit. The amount of profits will be settled by the final decree." In deciding the questions covered by the issues under reference the learned Judge has tried to make an equitable adjustment and in our opinion no one party can be allowed to question the correctness of the finding relating to any one of them without re-opening the other findings as well. We do not think that interests of justice demand such re-opening. On the whole the learned Judge's findings are just and equitable. While the plaintiff is not allowed to recover past profits defendants 1, 3 and 4 are not given anything for improving the property or by way of interest on the plaintiff's share of the common debts discharged by them. We cannot, therefore, find any justification to interfere with the lower court's decision.

The appeal will, therefore, stand dismissed. However, in the circumstances of the case we make no order for costs.

Order accordingly.

18th June, 1956.

Sd/- K.T. Koshi, C.J.,

Sd/- N. Varadaraja Iyengar, J.

(True Copy)

Compared by

M. S. Subramanian

[Signature]

Dy. Registrar,
for Registrar.