

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

The Honourable Dr. Justice T. Kochu Thommen

Wednesday, the 3rd day of June, 1987/13th Jyaishta, 1909.

S. A. No. 16 of 1980

(A.S.No. 160 of 1976 of the District Court, Kozhikode and O.S.No. 284 of 1975 of the Munsiff's Court, Kozhikode II.)

Appellants: Respondents: Defendants:

1. Velayudhan's son Aryanthottathil Sankaran, residing at Mannoor amsom desom in Kozhikode Taluk (died).
2. Velayudhan's son Aryan thottathil Cheyik alias Kunhappu, do. do.
3. Aryanthottathil deceased Sankaran's wife Ammu, do.
4. Thaniam, O/o. Sankaran, do. do.
5. Radhavi, do. do.
6. Ramchandran, O/o. do. do.
7. Indira, O/o. do. do.
8. Devarajan, O/o. do. do.
9. Ramavathi, O/o. do. do.
10. Prathikumaran (minor 15 years) by Guardian ~~for~~ 3rd appellant.

~~By Adv.~~

Supplemental appellants are impleaded as LRs of 1st appellant as per order on C.M.P.No. 6031 of 1985.

By Advs. T.R.S. Warriar and Sebastian Davis.

vs.

Respondents: ~~Ramchandran~~: Appellants: Plaintiffs.

son

1. Velayudhan's ~~son~~ Vallapali Kali, residing at Mannoor amsom and desom in Kozhikode Taluk.
2. Mannathodi Ammu, residing at Cheruvannoor amsom and desom in Kozhikode Taluk.
3. Vashiyadan Imbichammu, residing at Mannoor amsom and desom in Kozhikode Taluk.
4. Balakrishnan, P.S.No. 8121B, Dammam 312122, Saudi Arabia.

By Advs. R1 to 3: V.R. Venkiteshkrishnan

IN THE HIGH COURT OF KERALA AT ERNAMULU

-2- Present:

721. 1987, June 3rd no bench having been finally heard on 3rd June, 1987

the Bench on 3rd June, 1987. The Bench on 3rd June, 1987.

No. 10 of 1980

No. 10 of 1980 of the District Court, Kozhikode and No. 10 of 1980 of the District Court, Kozhikode II.

Respondents: Defendants:

1. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).
2. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).
3. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

4. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

5. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

6. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

7. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

8. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

9. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

10. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

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Respondents: Defendants: are included as respondents in the order of 1987.

by order of the District Court, Kozhikode, dated 1987.

vs.

Respondents: Defendants: are included as respondents in the order of 1987.

and

1. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

2. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

3. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

4. Vajayudhan, son of Vajayudhan, residing at Kozhikode, Kozhikode Taluk (died).

by order of the District Court, Kozhikode, dated 1987.

T. KOCHU THOMMEN, J.

S. A. No. 16 of 1980-C

JUDGMENT

The appellants are the defendants in a suit for partition. The case of the plaintiffs was that the property in question was a self-acquired property of Velayudhan. The plaintiffs are the daughters of Velayudhan. The appellants-defendants are the sons of Velayudhan. The trial court found that the kanam rights in the suit property belonged to a Mithakshara joint family of which Velayudhan was the kartha. The court further found that in 1956 Velayudhan out of his private funds acquired the jenmam right in the suit property. The court accordingly held that while the kanam right in the suit property belonged to the joint family, the jenmam right was separately held by Velayudhan. Partition on that basis was thus decreed by the trial court in respect of both these rights. Aggrieved by the finding that in respect of the suit property the jenmam right alone belonged to Velayudhan as separate property, the plaintiffs appealed. They contended that at any rate the two rights merged when

Velayudhan acquired the jenmam right in 1956 and therefore the asset in question was the exclusive property of Velayudhan and was partible as such. The lower appellate court did not interfere with the finding of the trial court as regards the joint family character of the kanam right. Nevertheless treating the jenmam right as a separate property of Velayudhan the lower appellate court held that the two rights merged when Velayudhan acquired the jenmam right. The only question now in this appeal is as to the correctness in law of that finding.

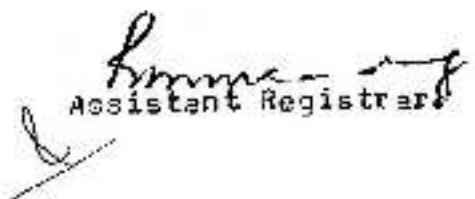
2. It is not disputed and cannot be disputed in the light of the concurrent finding that the kanam right belonged to the joint family at all material times. The appellants conceded in their written statement that the jenmam right was acquired by Velayudhan as a separate property. Appearing for the appellants, Shri. T.R.G. Mariy rightly in my view, submits that the appellate court was wrong in finding that the two rights merged. There could be no merger when, as concurrently found by the courts below, the kanam right belonged to the joint family and the newly acquired jenmam right belonged to Velayudhan as

his separate property. The two rights are therefore incapable of merging in so far as one was the family right and the other was an individual right. See the principle stated by the Supreme Court in Shah Mathuradas v. Nagappa, A.I.R. 1976 S.C. 1565. In the circumstances the learned appellate Judge erred in law in upholding the plaintiffs' contention raised for the first time before the appellate court on the question of merger. The judgment of the lower appellate court is set aside and the decree of the trial court is restored in full. The appeal is allowed in the above terms. No costs.

3rd June, 1987.

Sd/- T. Kochu Thommen, Judge.

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