

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 31ST DAY OF JULY 2017/9TH SRAVANA, 1939

SA.No. 368 of 1997 (B)

**AGAINST THE JUDGMENT AND DECREE DATED 27-11-1996 IN AS 25/1995 of SUB
COURT, KASARAGOD**

**AGAINST THE JUDGMENT AND DECREE DATED 29-11-1994 IN OS 209/1988 of
MUNSIFF COURT, KASARAGOD**

APPELLANTS/APPELLANTS/PLAINTIFFS:

1. VALLIYODAN KRISHNAN, S/O MELOTH KUNHAMBU NAIR,
RESIDING AT PADINHARE VALAPPU,
NEAR BELLOOR TEMPLE, PADDY VILLAGE,
KASARAGOD TALUK, P.O.EDNEER.
(DIED, LRS IMPEADED AS ADDITIONAL APPELLANTS 6 & 7)
2. VALLIYODAN GOPALAN NAIR, SON OF LATE PONNAMMA,
RESIDING AT SUBBAYYA MOOLE BEVENJE CHENGALA
VILLAGE AND POST, KASARAGOD TALUK AND DISTRICT.
3. VALLIYODAN NALINI, D/O DO IN DO.
4. VALLIYODAN RAGHAVAN NAIR, S/O DO IN DO DO
5. VALLIYODAN CHANDU, S/O DO IN DO

*** ADDITIONAL APPELLANTS IMPEADED**

**ADDL A6. NARAYANI M,
W/O LATE VALLIYODAN KRISHNAN,
RESIDING AT SUBBAYYA MOOLE BEVENJE,
CHENGALA VILLAGE AND POST, KASARAGOD TALUK
AND DISTRICT.**

**ADDL A7. OMANA, D/O LATE VALLIYODAN KRISHNAN,
RESIDING AT SUBBAYYA MOOLE BEVENJE,
CHENGALA VILLAGE AND POST, KASARAGOD TALUK
AND DISTRICT.**

**THE LEGAL HEIRS OF THE DECEASED APPELLANT NO.1 ARE
IMPEADED AS ADDITIONAL APPELLANTS 6 & 7 AS PER ORDER
DATED 31.7.2017 IN I.A.1887/2012**

**BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.P.B.KRISHNAN**

**RESPONDENTS/RESPONDENTS/DEFENDANT NO.2 AND SUPPLEMENTAL DEFENDANT
NO.3 IN THE SUIT:**

1. VALLIYODAN NARAYANAN NAIR, S/O KUNHAMBU NAIR,
RESIDING AT CHATHANGAI, KEKKEKARA P.O.,
CHANDRAGIRI, KALNAD VILLAGE,
KASARAGOD TALUK AND DISTRICT.
2. KUNHIRAMAN NAIR, S/O V.KRISHNAN NAIR,
RESIDING AT PARAMBILA VEETIL, CHATHANGAI,
KALNAD VILLAGE. P.O, CHANDRAGIRI,
KASARAGOD TALUK AND DISTRICT.

R1 BY ADV. SRI.K.G.GOURI SANKAR RAI
R2 BY ADVS. SRI.A.P.CHANDRASEKHARAN
SMT.PRABHA R.MENON

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 31-07-2017, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rmm

K.RAMAKRISHNAN, J.

S.A.No.368 of 1997

Dated this the 31st day of July, 2017

J U D G M E N T

The suit was one for partition. According to the plaintiffs, there was a partition in their tharawad and the plaint schedule properties were set apart to the thavazhi of which plaintiffs and defendants were members and there was no subsequent partition. So they filed the suit for partition.

2. The 2nd defendant contested the matter stating that there was an oral partition among members of thavazhi and the suit properties were set apart to the share of defendants 1 and 2. 1st defendant released her share in favour of the 2nd defendant and as such plaintiffs have no right and prayed for dismissal of the suit.

3. 3rd defendant also contested by filing written statement stating that Ext.B1 sale deed in his favour is valid and as such plaintiffs have no right over the property and he came to be a bona fide purchaser and entitled to protection and the properties are not available for partition. He had further contended that in case it is found that the properties are partible, the shares allotted to the 2nd defendant may be allotted to him.

4. The plaintiff was examined as PW1 and Exts.A1 to A3

were marked. The defendant produced Exts.B1 to B5.

5. Both the courts accepted the plea of oral partition and trial court dismissed the suit and that was confirmed by the appellate court. Hence the second appeal.

6. Following question of law has been formulated when the appeal was admitted:

"1. Whether on the facts and circumstances of the case, the lower appellate court was justified in law in finding an oral partition in the thavazhy of the parties to the suit.

2. Is not the judgment and decree of the lower appellate court unsustainable in law for being based on a vague plea of an oral partition in the written statement of defendant No.2, the alleged terms of which are neither pleaded nor established by evidence ?

3. Has not the burden to prove that the suit properties are unavailable for partition shifted to the defendants and have they not failed to establish their case ?

4. Whether on the facts and circumstances of the case, the lower appellate court was justified in law in finding that the suit properties are unavailable for partition. ?

5. Whether the judgment and decree of the lower appellate court is sustainable in law ?"

7. After considering the contentions of both parties, this Court by judgment dated 13.7.2011 set aside the decree and judgment passed by the court below and remanded the matter to the trial court for giving the opportunity to the parties to prove oral partition and also consider the question of including other properties sought to be partitioned and also to decide equities and accordingly remanded the matter to the court below. It is thereafter the subsequent development has happened for

impleading the legal heirs of 1st plaintiff, the applications filed by them was dismissed by the trial court and thereafter they filed the application before this Court and this Court, by order in I.A. 1887/2012 & I.A. 1888/2012 and C.M.Application 809/2012, allowed the application to implead the legal heirs of 1st appellant after condoning the delay and setting aside abatement after reopening the appeal.

8. This Court, on earlier occasion, after hearing both sides, came to the conclusion that since there is no dispute regarding the fact that in the tharawad partition, the plaint schedule property was allotted to the share of the thavazhi of which plaintiffs and defendants are members, the plea of oral partition raised by the respondent has to be proved by them and Exts.B1 to B4 produced without adducing any oral evidence on the side of defendants is not sufficient to prove oral partition so as disentitle the right partition to the plaintiffs and on the basis of the submission made by the counsel for the respondents, the case is remanded for giving opportunity to the parties to adduce evidence regarding the claim of oral partition and if they want to include further property if any excluded for partition. On going through the materials available on record, I do not find reason to vary from the conclusion arrived by my predecessor in the earlier judgement, which is recalled now. So the appeal is allowed and

the decree and judgment passed by the courts below, dismissing the suit, are set aside and matter is remitted to the lower court for fresh disposal in accordance with law. Parties are directed to bear their respective costs in the appeal. The court below is directed to take the case on file as the legal representatives of the 1st plaintiff, who are impleaded in the appeal now as additional appellants 6 and 7 and the defect has been cured. The court below is directed to consider the questions directed by this Court in the judgment dated 13.7.2011 after giving opportunity to the parties to take further steps in this regard and giving opportunity to adduce further evidence, if any, required to substantiate their case to prove the oral partition as well as the equities to be worked out and then dispose of the case afresh in accordance with law. The parties are directed to appear before the trial court on 30.8.2017. Considering the fact that the case of the year 1988, the trial court is directed to expedite dispose of the case as early as possible at any rate, within nine months from the date of receipt of this judgment. Registry is directed to send the records to the court below immediately with the copy of the judgment.

Sd/-
K.RAMAKRISHNAN
JUDGE

rmm/1.08.2017