IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

FRIDAY, THE 29TH DAY OF OCTOBER 2021 / 7TH KARTHIKA, 1943

RSA NO. 613 OF 2019

[AGAINST THE JUDGMENT AND DECREE DTD.15.12.2017 IN AS 146/2014 ON THE FILE OF THE COURT OF ADDITIONAL DISTRICT JUDGE - III, PATHANAMTHITTA CONFIRMING THE JUDGMENT AND DECREE DTD.27.10.2014 IN OS 73/2009 OF MUNSIFF'S COURT, RANNI]

APPELLANT/APPELLANT/1ST DEFENDANT:

T.D.RADHAKRISHNAN NAIR,
AGED 51 YEARS,
S/O. C.R. DIVAKARAN NAIR, THAMARASSERIL HOUSE,
MADAMON-THEKKEKARA POST., MADAMON THEKKEKARA
MURI, PERUNADU VILLAGE, RANNI TALUK,
PATHANAMTHITTA DISTRICT.

BY ADV.SRI.SAMEER NAIR
BY ADVS.
MANU RAMACHANDRAN
SRI.T.S.SARATH
SRI.R.RAJESH (VARKALA)

RESPONDENTS/RESPONDENTS/PLAINTIFFS 1 TO 5 & DEFENDANTS 2 TO 4:

1 CHANDRAVATHY AMMA
AGED 65 YEARS
W/O. CHANDRASEKHARAN NAIR, SANTHOSH BHAVAN,
KADAMMANITTA POST, CHERUKOLE VILLAGE,
KOZHENCHERRY,
PATHANAMTHITTA DISTRICT 689 649

2 SUSHEELA NARENDRAPRASAD,
AGED 60 YEARS,W/O.NARENDRA PRASAD,
RESIDING AT PRAVEEN BHAVAN, VALLAMKULAM MURI,
ERVAVIPEROOR VILLAGE, THIRUVALLA TALUK,
PATHANAMTHITTA DISTRICT 689 541.

3 SUDHA TULASEEDHARAN,
AGED 58 YEARS, W/O.THULASEEDHARAN,
BHAVANIMANDIRATHIL, THOLIKKODU POST, PUNALUR
VILLAGE, PUNALUR TALUK,
PATHANAMTHITTA DISTRICT 691 333

4 USHAKUMARI,
AGED 55 YEARS, D/O.C.R.DIVAKARAN NAIR,
RESIDING AT CHAMBON HOUSE, VADASSERIKKARA P.O.,
PERUNADU VILLAGE, RANNI TALUK,
PATHANAMTHITTA DISTRICT 689 661

5 SHEELA HARIKUMAR,
AGED 50 YEARS, W/O.HARIKUMAR,
RESIDING AT NELLIKUNNATHU HOUSE, PARIYARAM POST,
ELANTHOOR VILLAGE, KOZHENCHERY TALUK,
PATHANAMTHITTA 689 585

6 RUKMINIAMMA,
AGED 62 YEARS,
W/O LATE SASIDHARAN NAIR, RESIDING AT THAMARASSERIL HOUSE, MADAMON POST, PERUNADU VILLAGE, RANNI TALUK, PATHANAMTHITTA DISTRICT 689 711

7 SEEJU,
AGED 45 YEARS,
S/O. RUKMINIAMMA,
RESIDING AT THAMARSSERIL HOUSE, MADAMON POST,
PERUNADU VILLAGE, RANNI TALUK, PATHANAMTHITTA
DISTRICT 689 711

8 SEENU,
AGED 40 YEARS,
S/O. RUKMINIAMMA,RESIDING AT THAMARASSERIL HOUSE,
MADAMON POST, PERUNADU VILLAGE, RANNI TALUK,
PATHANANTHITTA DISTRICT 689 711.

BY ADVS.
SRI.ANSU VARGHESE FOR R1.
SRI.JOSEPH GEORGE FOR R2 TO R8.
SRI.BIJO THOMAS GEORGE
SMT.NICEY A. MENON
SRI.P.A.REJIMON

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 27.10.2021, THE COURT ON 29.10.2021 DELIVERED THE FOLLOWING:

J U D G M E N T

This second appeal is directed against the judgment and decree dtd.15.12.2017 in A.S.No.146/2014 on the file of the Additional District Court-III, Pathanamthitta (hereinafter referred to as 'the first appellate court') whereby the judgment and decree dated 27.10.2014 in O.S.No.73/2009 on the file of the Munsiff's Court, Ranni (hereinafter referred to as 'the trial court') was confirmed. The appellant is the first defendant in the above suit. The suit was for partition of the plaint schedule property.

2. The plaintiffs, the first defendant and the husband of defendant No.2 and father of defendant Nos.3 and 4 are the children of the deceased C.R.Divakaran Nair. The aforesaid Divakaran Nair had obtained title over the plaint schedule property by virtue of Exts.A1 and A2 documents. He died intestate as early as in 1993. Meenakshi Amma, the wife of late Divakaran Nair, died intestate in 1999. After the death of Divakaran Nair and Meenakshi Amma, the plaint schedule

property devolved on the plaintiffs as well as the defendants as legal heirs. The plaintiffs claim 5/7 right over the plaint schedule property. The first defendant is not ready to partition the plaint schedule property by metes and bounds. Hence, the suit.

3. The first defendant filed written statement, contending that the plaint schedule property is not identifiable. However, he admitted the relationship between the parties to the suit. He also admitted that his father and mother ie., late Divakaran Nair and late Meenakshi Amma were the owners of the property. He contended that the plaintiffs were given in marriage during the life time of their father and they were given money and gold ornaments after disposing 12 acres of landed property owned by the father. Over and above, 12 cents and 30 cents of landed property were given by his father and mother respectively to defendant Nos.2 to 4 and his father went to the extent of constructing a new house therein and was given to defendant Nos 2 to 4. Added to this, it was contended by the first defendant that by the family

arrangement on 10.2.1993, the plaint schedule property was given to the first defendant exclusively. According to him, his father had agreed to execute a settlement deed in his favour. However, he passed away on 14.2.1993 due to sudden heart attack. He would contend that fifth plaintiff received an amount of Rs.75,000/- from him in 1995. When he demanded the money back, it was not paid stating that the first defendant has been enjoying the property for and on behalf of the 5th plaintiff as well.

4. Defendants 2 to 4 filed a written statement raising a counter claim. They supported the claim of the plaintiffs and contended that they are entitled to get 1/7th share in the plaint schedule property and prayed for allowing the counter claim for partition of the plaint schedule property by metes and bounds.

5. The trial court framed necessary issues for trial. During the trial, the second plaintiff was examined as PW1 and marked Exts.A1 and A2 on the side of the plaintiffs. The first and third defendants were examined as DWs.1 and 2.

6. On appreciation of the evidence, the trial court entered a finding that the parties are co-owners of the plaint schedule property subsequent to the death of Meenakshi Amma and Divakaran Nair. Accordingly, a preliminary decree was passed allowing 1/7th share of the plaint schedule property to each of the plaintiffs, 1/7th share to the first defendant and 1/7th share to defendant Nos. 2 to 4 jointly. Challenging the preliminary judgment and decree, the first defendant preferred an appeal before the first appellate court. The first appeal was dismissed confirming the judgment and decree of the trial court. Hence, this second appeal.

7. Heard Sri.Sameer Nair, the learned counsel appearing for the appellant, Sri.Ansu Varghese, the learned counsel for respondent No.1 and Sri.Joseph George, the learned counsel for respondent Nos.2 to 8.

8. Learned counsel for the appellant contended that at the intervention of his father, the family settlement was agreed between the parties whereby he obtained the plaint schedule properties. According to the learned counsel for the

appellant, the family settlement as deposed by DW1 can be accepted as piece of evidence for explaining the conduct of the plaintiffs in receiving the patrimony and gold from the father at the time of their marriage in lieu of relinquishing their interest in the scheduled properties. Learned counsel for the appellant relied on the decisions reported in **Tek Bahadur Bhujil** v. **Debi Singh Bhujil and others** [1966 KHC 417], **Kale** v. **Deputy Director of Consolidation** [1976 KHC 809], **M.N.Aryamurthi and another** v. **M.L.Subbaraya Setty (dead) by his legal Representatives and Others** [1972 KHC 659] and **Korukonda Chalapathi Rao and another** v. **Korukonda Annapurna Sampath Kumar** [Manu/SC/0757/2021] and contended that the family arrangement pleaded is substantiated in accordance with law.

9. On the other hand, the learned counsel for the contesting respondents submitted that the parties are co-owners subsequent to the death of their father and mother and the plaint schedule property is partible. According to the learned counsel, the intention of the appellant is to drag on

the suit for partition raising untenable plea of family settlement as a pretext for avoiding partition of the plaint schedule property to the detriment of the other co-owners. It is their common contention that the plea of family settlement lacks bona fides and is liable to be discarded.

10. Certain facts are admitted. The first defendant is the brother of the plaintiffs and defendant Nos.2 to 4 are respectively the wife and children of plaintiffs' deceased brother, late Sasidharan. They are having intestate succession over the plaint schedule property, which belonged to their father late C.R.Divakaran Nair as per Exts.A1 and A2. Divakaran Nair passed away in 1993. Subsequent to the death of Divakaran Nair, his wife Meenakshi Amma, who is none other than the mother of the parties, died in 1999. The plaint schedule property consists of five shoprooms within Perunad Grama Panchayath.

11. The first defendant contended that the plaint schedule property is not identifiable and an executable decree cannot be passed. According to him, the plaint schedule

property is not partible. He admitted that his father died on 14.2.1993. However, his contention is that just before his death, the plaint schedule shoprooms were given to him exclusively by virtue of a family settlement dated 10.2.1993. He deposed as DW1 that the plaintiffs, who are none other than his sisters, were given proper patrimony as well as gold ornaments at the time of marriage after disposing 12 acres of landed property owned by his father. He further deposed that defendants 2 to 4 were given 12 cents of property by his father and another 30 cents by his mother. He would say that his father constructed a residential building for them in the said property. He stated that he has been conducting a provision shop in the shop rooms for the past 16 years consequent to the family arrangement between the parties. It is his further case that first defendant's father promised to execute a settlement deed in favour of the first defendant before his death. However, such a settlement deed could not be executed due to his sudden death.

12. It is not in dispute that the parties are closely

related. The father and mother of the plaintiffs and defendants are no more. The father obtained plaint schedule property by virtue of Exts.A1 and A2. The title is not disputed. Based on the oral evidence adduced during trial, the trial court negatived the contention on family settlement. The trial court held that the evidence adduced was not reliable or trustworthy as the evidence is not sufficient to prove the family settlement pleaded. The first appellate court found that the first defendant had failed to prove the family settlement pleaded. After analysing the entire evidence, the first appellate court held that no document was produced by the first defendant to show that the father had given property to defendants 2 to 4. It is a fact that DW1 stated in evidence that he had constructed additional rooms in the building in the plaint schedule property. However, there was no such pleading in the written statement.

13. No evidence was adduced by the appellant to prove that the family arrangement pleaded by him was accepted by other co-owners. The first appellate court relied on the Apex Court decision reported in **M.N.Aryamurthi and**

another v. **M.L.Subbaraya Setty (dead) by his legal Representatives and Others** [(1972) 4 SCC 1] and held that the alleged family settlement is not binding on other sharers of the plaint schedule property and that the first defendant has failed to prove the alleged family settlement pleaded by him.

14. While passing preliminary decree, the court is concerned as to whether the plaint schedule property is partible. The shares can be allotted to the sharers in accordance with law only during the final decree stage. The plaintiffs and the defendants, being the class one legal heirs, are entitled to share in the plaint schedule property as concurrently held by the courts below. Both the trial court and the first appellate court concurrently found that the plaintiffs and the first defendant are entitled to 1/7th share each and defendants 2 to 4 are jointly entitled to 1/7th share over the plaint schedule property.

15. On going through the entire evidence, this Court is of the view that the family settlement pleaded lacks

bona fides to resolve family disputes and rival claims. The alleged family settlement, which was oral in nature, was made four days before the death of the father of the appellant. There was no evidence adduced to prove that it was made voluntarily by the deceased. The family settlement was not reduced to writing. There was no case that all the sharers were parties to the family settlement. Further, there was no evidence to prove that the alleged family settlement would result in establishing or ensuring amity and goodwill among the plaintiffs and defendants.

16. The jurisdiction of the High Court to entertain appeal under Section 100 of the Code of Civil Procedure is strictly confined to cases involving substantial question of law. In the present case, the trial court as well as the first appellate court gave cogent reasons on appreciation of evidence on record and thereafter, held that the plaintiffs are entitled to get a preliminary decree for partition. This is a clear case whereby the plaintiffs have succeeded in proving that the parties are co-owners and they are entitled to share over the

plaint schedule property. The judicial precedents cited by the learned counsel for the appellant are only an attempt to raise a substantial question of law touching the family settlement, though the contentions of the appellant are prima facie unsustainable. The judicial precedents submitted by the learned counsel for the appellant are not applicable in this case and have no nexus or connection with facts and circumstances involved in this case. No substantial questions of law arise for consideration in this appeal.

Resultantly, this R.S.A is dismissed in limine. There will be no order as to cost. Pending applications, if any, shall stand closed.

Sd/-

(**N.ANIL KUMAR**)
JUDGE

MBS/