

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

TUESDAY, THE 30TH DAY OF AUGUST 2022 / 8TH BHADRA, 1944

RSA NO. 44 OF 2022

AGAINST THE JUDGMENT AND DECREE DATED 10.03.2021 IN AS.NO. 18/2019 OF
SUB JUDGE'S COURT, KARUNAGAPPALLY, ARISING FROM THE JUDGMENT AND
DECREE DATED 11.12.2018 IN O.S..No.133/2015 ON THE FILE OF THE
MUNSIFF'S COURT, KARUNAGAPPALLY

APPELLANTS/RESPONDENTS 2-5/PLAINTIFFS 2-5:

- 1 BRINDA , AGED 60 YEARS
D/O.INDIRA, THAIMOOTTIL, ALAPPADU, P.O.KARUNGAPPALLY,
KOLLAM, PIN - 690 525.
- 2 JAYAKRISHNAN,AGED 57 YEARS
S/O.LATE NARAYANAN, CHITTEPPADATHU, VENNALA P.O.,
ERNAKULAM, PIN - 682 028.
- 3 JAYASREE,AGED 54 YEARS
D/O.INDIRA, KODIVEETIL, THUMPOLI P.O., ALAPPUZHA, PIN -
688 008.
- 4 GOPAKUMAR, AGED 52 YEARS
S/O.LATE NARAYANAN, ASWATHY BHAVAN, KALLELIBHAGOM P.O.,
KALLELIBHAGOM VILLAGE, KARUNGAPPALLY, KOLLAM - 690 519.
BY ADVS.
K.S.HARIHARAPUTHRAN
BHANU THILAK

RESPONDENT/APPELLANT DEFENDANT:

MUKTHA K.N.,AGED 60 YEARS
D/O.LATE NARAYANAN, KOYIKKALETHU, MARUTHOORKULANGARA (S),
ALUMKADAVU P.O., KARUNAGAPPALLY, KOLLAM, PIN - 690 573.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
26.08.2022, ALONG WITH R.S.A.NO.65/2022, THE COURT ON 30.08.2022
DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

TUESDAY, THE 30TH DAY OF AUGUST 2022 / 8TH BHADRA, 1944

RSA NO. 65 OF 2022

AGAINST THE JUDGMENT AND DECREE DATED 10.03.2021 IN AS 10/2019
OF SUB JUDGE'S COURT, KARUNAGAPPALLY ARISING FROM THE JUDGMENT
AND DECREE DATED 11.12.2018 IN OS 61/2016 OF MUNSIFF'S COURT,
KARUNAGAPPALLY

APPELLANTS/RESPONDENTS 2 TO 5/DEFENDANTS 2 TO 5:

- 1 BRINDA, AGED 60 YEARS
D/O. INDIRA, THAIMOOTIL,
ALAPPADU P.O, KARUNAGAPPALLY,
KOLLAM PIN 690 525
- 2 JAYAKRISHNAN, AGED 57 YEARS
S/O. LATE NARAYANAN, CHITTEPPADATHU,
VENNALA P.O, ERNAKULAM 682 028
- 3 JAYASREE, AGED 54 YEARS
D/O. INDIRA, KODIVEETIL, THUMPOLI P.O,
ALAPPUZHA 688 008
- 4 GOPAKUMAR, AGED 52 YEARS
S/O. LATE NARAYANAN, ASWATHY BHAVAN,
KALLELIBHAGOM P.O, KALLELIBHAGOM VILLAGE,
KARUNAGAPPALLY, KOLLAM 690 519
BY ADVS.
K.S.HARIHARAPUTHRAN
BHANU THILAK

RESPONDENT/APPELLANT/PLAINTIFF:

MUKTA K.N, AGED 60 YEARS
D/O. LATE NARAYANAN, KOYIKKALETHU,
MARUTHOORKULANGARA (S) ALUMKADAVU P.O,
KARUNAGAPPALLY, KOLLAM PIN 690 573

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
26.08.2022, ALONG WITH R.S.A.NO.44/2022, THE COURT ON 30.08.2022
DELIVERED THE FOLLOWING:

(C.R.)

COMMON JUDGMENT

R.S.A.No.42/2022 has been filed against the judgment and decree in A.S.No.18/2019 on the file of Sub Judge, Karunagappally which arose out of judgment and decree in O.S.No.133/2015 on the file of Munsiff's Court, Karunagappally. R.S.A.No.65/2022 has been filed against the judgment and decree in A.S.No.10/2019 on the file of Sub Judge, Karunagappally which arose out of judgment and decree in O.S.No. 61/2016 on the file of Munsiff's Court, Karunagappally.

2. O.S.No. 133/2015 has been filed for partition of property belonging to late Narayanan. 1st defendant in O.S.No.61/2016 is the 1st plaintiff in O.S.No.133/2015. She claims to be the wife of late Narayanan and plaintiff Nos. 2 to 5 and the defendant are the children of Narayanan and 1st plaintiff. Defendant on other hand contended in written statement that the 1st plaintiff is not legally wedded wife of Narayanan and hence, she is not entitled to get share of property

belonging to Narayanan.

3. O.S.No.61/2016 was originally filed for setting aside the will No.3/1986 dated 17.12.1986 executed by late Sri.Narayanan and subsequently amended adding prayer for declaration that the 1st defendant is not the legally wedded wife of Sri. Narayanan and further for declaring adverse possession of the plaintiff over plaint A, B and C schedule properties and also for setting aside sale deed Nos. 6579/1960 and 1232/1972 executed in favour of 1st defendant. (Parties would hereinafter be referred as per their status in O.S.No.133/2015).

4. The learned Munsiff found that issue as to the marital status of 1st plaintiff with late Narayanan arises for consideration in both cases and hence, it is in the nature of dispute specifically referred to under Section 7(1) of explanation clause (b) of the Family Courts Act. Accordingly, it was found that the Civil court has no jurisdiction to entertain the suits and hence, it is not maintainable and rejected under Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908 (in short, 'the Code').

5. Aggrieved by the common order passed by the learned

Munsiff, the defendant in O.S.No.133/2016 and plaintiff in O.S.No. 61/2016 filed appeal before the 1st appellate court and the 1st appellate court interpreting the provisions of Section 7 as well as placing reliance on *Abraham K.S and Another v. Leena George* [ILR 2017 2 Kerala 197] as well as *Ammini v. Anees* [2014 1 KLT 215] confirmed the order of the learned Munsiff and dismissed the appeal. Aggrieved by the same, plaintiff Nos. 2 to 5 in O.S.No.133/2015 and defendant Nos. 2 to 5 in O.S.No.61/2016 came up in these Regular Second Appeals before this Court.

6. Notice was issued to respondent in both appeals and it was duly served but there is no appearance on behalf of her. This court at the time of admission formulated the following substantial question of law:

In R.S.A.No.65/2022:

I) When the suit is filed for setting aside a will executed by the deceased, since no questions regarding marital status, validity of marriage and rights arising therefrom, are involved and since no adjudication in that regard is to be made, have not the courts below went wrong in finding that the suit is not maintainable, before the Civil Court and the Family alone has jurisdiction and authority to

decide the suit ?

II) In so far as the issue involved in the suit do not relate to the legitimacy of marriage between the 1st defendant and the deceased Narayanan and no right is claimed by the 1st defendant as the legally wedded wife of deceased and the defendants 1 to 5 do not also claim any right on that basis, no adjudication as provided U/s.7 of the Family Courts Act, is mandated and therefore, have not the Courts below erred in finding that a Civil Court has no jurisdiction to entertain the suit and only Family Court alone has jurisdiction to try and decide the suit ?

In R.S.A.No.44/2022

I) When the suit is filed for partition and separate possession of the properties, on the basis of outright sale deed and also a Will executed by the deceased, since no questions regarding marital status, validity of marriage and rights thereon, are involved and since no adjudication in that regard is to be made, have not the courts below gone wrong in finding that the suit is not maintainable before the Civil Court and the Family Court alone has jurisdiction and authority to decide the suit.

7. Since the appeals arouse out of common judgment and subject matter and parties in both cases are one and the same, both

appeals were heard together and common judgment has been passed.

8. According to the learned counsel for the appellants/plaintiffs, both courts below did not properly evaluated the scope of suits as well as the scope of application of Section 7 of the Family courts Act, 1984 (In short 'the Act'). According to him, O.S.No.133/2015 is one for partition and separate possession on the basis of sale deed executed in the joint names of deceased Narayanan and 1st plaintiff and will executed by deceased Narayanan in favour of plaintiffs and defendant and hence, the question of marital status of the 1st defendant and issue in relation to her marital status does not arise so as to apply provisions of Section 7 of the Family Courts Act in order to exclude the jurisdiction of Civil court. It is also his contention that the son of deceased Narayanan Sri. Balachandran earlier filed O.S.No.118/1994 claiming 1/7 share over plaint schedule properties against plaintiff and the defendant and though he challenged the genuineness of the will, the Munsiff's court found both sale deed as well as will as valid and dismissed the suit and that has been come final. It is also contended that both, ***Abraham K.S and***

Another v. Leela George[ILR 2017 2 Kerala 197] as well as *Ammini v. Anees* [2014 1 KLT 215] have no application to the cases in hand.

9. It is discernible from the judgment passed by the 1st appellate court that both appellant and respondents were contending together that the Civil court has jurisdiction and matter has to be remanded back to trial court for disposal on merits. But the 1st appellate court also had taken the view that plaintiffs are claiming rights over plaint schedule property as the legally wedded wife and children of late Narayanan and legal marriage and marital status of the 1st plaintiff with late Narayan is actually in dispute in both cases and hence, the 1st appellate court also taken a view that there is an express bar under Section 8 of the Act for entertaining the suits and Family court alone has got exclusive jurisdiction and confirmed the order passed by the Munsiff.

10. So the question for consideration is whether Section 7 of the Family Courts Act, 1984 has any application to the cases in hand. It would be apposite in this context to quote relevant portions of Section 7 of the Act, which reads thus:

7. Jurisdiction.-

(1) Subject to the other provisions of this Act, a Family Court shall- -

(1) Subject to the other provisions of this Act, a Family Court shall-"

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

2) xxx

11. The learned Munsiff found that the bar under Section 7(1) explanation Clause (b) would be attracted and the 1st appellate court did not specify the Sub Clauses and found that Family court has got exclusive jurisdiction to try both suit as per Section 7.

12. The dictum laid down in ***Abraham K.S (supra)*** is that if there is a dispute regarding the legitimacy of marriage and declaration regarding the status of marriage of the parties to the marriage and claiming right on that basis regarding the validity of the marriage etc., those are matters to be considered by the Family court and it is also held that in such cases it is not necessary that it must be between the parties to the marriage alone but such a relief can be claimed after one of the parties to the marriage died also in a similar case.

13. This Court noticed that rival claims set up by plaintiff and 3rd defendant in that case over the plaint schedule property as the legal heirs of deceased claiming to be his legally wedded wife and hence found that suit could not have been entertained by the Munsiff's court.

It is also held that exclusive jurisdiction to entertain a suit or proceedings between parties with respect to the properties of the spouses or either of them is confined only on the Family court. So, obviously in that case there is dispute between the plaintiff and the 3rd defendant with regard to the marital status and 1st plaintiff as well as 3rd defendant claimed to be the legally wedded wife of deceased in that case. It was in the said circumstances, this Court held that the Family Court alone has got exclusive jurisdiction.

14. But in the present case, according to the plaintiffs in O.S.No.133/1995 they are the wife and children of deceased Narayanan and defendant is also the daughter of late Narayanan born to 1st plaintiff. The plaint schedule properties are jointly owned by Narayanan and 1st plaintiff and late Narayanan executed will deed No.3/86 of Karunagappally SRO with regard to his right over plaint A and B schedule properties in favour of plaintiffs and defendant. 1st defendant raised a contention that 1st plaintiff is not the legally wedded wife of Narayanan and Narayanan married one Anantha Bai at first and a son named Balachandran is also born out of that

wedlock. The plaintiff has got a specific contention that the said Balachandran has filed O.S.No.118/2004 before Munsiff court, Karunagappally claiming 1/7th share over plaint items against plaintiffs and defendants and in which he admitted the sale deed in favour of deceased Narayanan and 1st plaintiff. Though the genuineness of the will was challenged that suit was dismissed and that has become final. That apart in the present case, the specific case of the plaintiff is that the plaint schedule properties are jointly owned by 1st plaintiff and Narayanan and with respect to his share he has executed a will in favour of plaintiffs and defendant giving them equal shares. Since the property allegedly belong to 1st plaintiff and late Narayanan jointly and Narayanan already executed a will with respect to his half right bequeathing the properties equally among the plaintiff and the defendant, there is no question of arising a dispute with respect to property in between the parties to marriage or any circumstances arising out of marital relationship since the plaintiffs and the defendant are wife and children of late Narayanan.

15. In order to attract Clause (c) of explanation to Sub Section 1

of Section 7 of the Act, parties should have a case that the suit or proceeding should be between the parties to marriage and it should be with respect to the property of the parties or either of them. Here the plaintiffs and defendant being wife and children of late Narayanan, they cannot be treated as parties to a marriage and the property and dispute also cannot be said as with respect to the property of the parties to marriage or either of them. In other words, the dispute between a mother and children cannot at any moment can be included under Clause (c) of explanation to Section 7(1).

16. In order to attract Clause (d) of explanation to Section 7(1), it must be satisfied that a suit or proceedings for an order or injunction should be in circumstances arising out of a marital relationship. That also has no application in the case at hand. It is relevant in this context to quote **Anitha v. Ramani Nair** [2014 2 KLT SN 73 (C. No.93)] wherein a Division Bench of this Court dealt with in detail, the scope and application of Section 7(1)(c) and 7(1)(d) of the Act. Para 16 of the said judgment is relevant which reads thus:

'This is not a proceedings between parties to marriage. The

parties to it claim right under a partition deed. Their right is independent of the marriage between plaintiff and her deceased husband. The relationship between the parties is irrelevant to decide the lis.”

It was also held that in the fact and circumstances, neither clause (c) nor (d) in the Explanation to Section 7(1) of the Act would be applied.

17. It is also relevant in this context to quote ***Devaki Antharjanam v. Narayanan Namboothiri*** [2006 2 KLT 1022] wherein a learned Single Judge in a suit filed for partition between husband, wife and son had occasion to consider whether jurisdiction of Civil court would be ousted and it has been held that a sharer other than a party to a marriage may seek partition of his share against the other co-owners including persons who are “parties to a marriage” and it is also held that existence of such parties to a marriage in the party array is not a ground to hold that only Family court has jurisdiction. It is further held that co-ownership property of husband, wife and son cannot be said to be a property of the parties to a marriage or either of them and Civil court has got jurisdiction to try

the suit.

18. In ***Thomas v. Ponnamma Thomas*** [2013 4 KLT 43], the Division Bench of this Court while dealing with Section Explanation (c) to Section 7(1) held that if a suit is filed by father against his son alone that suit will be beyond scope of Explanation (c) to Section 7(1) and the Civil court will alone have the jurisdiction to deal with such suit.

19. O.S.No.61/2016 filed by defendant involves complex issues for setting aside the Will executed by late Narayanan and for declaring that 1st plaintiff is not legally wedded wife of late Narayanan and further declaration of adverse possession of the plaintiff upon plaintiff A, B and C schedule property and to set aside Sale Deed Nos. 6576/1960 and 1232/1972 executed in favour of 1st defendant. A portion from Paragraph No.18 in ***Devaki Antharjanam (supra)*** is *relevant in this context to be extracted. Which read thus;*

“There cannot be different forum for filing the suit for partition depending on who files the suit. There may be cases for partition where there are several sharers; those sharers may include parties to a marriage. It may also be true that in such a case, there may be dispute between the parties to the marriage. That does not mean that the Family

Court has jurisdiction to entertain and decide the suit, only on the ground that two of the parties to the suit consist of parties to a marriage. The disputes involved in a partition suit, may, sometimes, be complex. Different parties may set up different rights and may sometimes claim exclusive rights. Some of the parties may claim reservation or equity. Some may set up tenancy rights under the Land Reforms Act having been created in their favour or in favour of strangers. If the question of tenancy arises, it has to be referred to the Land Tribunal which has exclusive jurisdiction to decide the question of tenancy, in view of Section 125(3) of the Kerala Land Reforms Act. These are all matters for the civil court to decide and they do not come within the jurisdiction of the Family Court. If the property sought to be partitioned belongs to either or both the parties to the marriage and they are the only parties to the suit or proceeding, the Family Court would have jurisdiction to decide that suit or proceeding. But that is not the position where there are other sharers or persons claiming independent rights.”

20. In the present case, the specific case of the plaintiff is that the plaint schedule properties are jointly owned by 1st plaintiff and late Narayanan. Late Narayanan executed a Will with respect to his half right equally in favour of plaintiff as well as defendant. So the mother and children cannot be taken as parties to marriage and the property as the property of the parties to marriage or of either of them so as to attract the bar under Explanation (c) to Section 7(1).

21. In O.S.No.61/2016, the suit was originally filed for setting

aside the Will executed by late Narayanan and subsequently incorporated a relief of declaration that 1st defendant is not the legally wedded wife of Sri.Narayanan along with declaration of adverse possession which are all not relevant here. So the question may also arise as to whether the relief of declaration that the 1st defendant is not legally wedded wife of Sri.Narayanan would in any way attract Explanation (b) to Section 7(1) which provides that a suit or proceedings for a declaration as to the validity of marriage or as to the matrimonial status of any person will come within the jurisdiction of Family court. The learned counsel for the appellant would vehemently content that there is no family dispute to be resolved by Family court in either of the cases and according to him, the 1st plaintiff, the mother of the defendant is no more.

22. The learned counsel in this context placed reliance on ***Kasthoori R and Others v. M. Kasthoori and Others*** [AIR 2018 SC 786; 2018 (5) SCC 353; 2018 KHC 2535]. In that case, the suit was instituted by the plaintiffs in a Civil court seeking for a declaration that the 1st plaintiff is the legally wedded wife of the deceased and

further to declare that other plaintiffs are the children of 1st plaintiff out of deceased and further to declare the 1st plaintiff as wife, plaintiff 2 to 4 as children and 3rd defendant as mother are the legal heirs of deceased. In that context, by referring to the statement of objects and reasons for which the Family court was setup it has been discussed by the Apex Court that Family Courts were set up mainly for settlement of family dispute and emphasize was laid on conciliation and achieving desirable results and to eliminate adherence of rigid rules of procedure and evidence. Recommendation of law commission in 59th report (1974) stressing that in dealing with dispute concerning the Family, the court to adopt an approach radically different from that adopted in ordinary civil proceedings and the court should make reasonable efforts for settlement before the commencement of trial was taken note of. Special procedure prescribed as per Section 13, 14 and 15 and Section 4(4) of the Act also emphasized. Object of reserving and saving the institution of marriage by constituting a specialized body has also been emphasized by making reference to Section 4(4) of the Act. Ultimately, Apex Court found that there was

no family dispute between plaintiffs and the defendants and the dispute arose after the demise of Gunaseelan (deceased) to whom both plaintiff No.1 and defendant No.1 claim to be married and other plaintiff and defendant are the children claim to be born out of respective marriage. Evaluating the above factors, the Apex court concluded that the above facts will indicate that dispute between the parties will be purely a civil dispute and has no bearing on any dispute within a family which needs to be resolved by a special procedure as provided under the Act. It is also found that no issue with regard to the institution of marriage and the need to preserve the same also arises in that case. The dispute between the parties can only be resolved on the basis of evidence to be tendered by the parties, admissibility of which has to be adjudged within the four corners of the provisions of the Indian Evidence Act, 1872.

23. In the present case, one suit is filed by mother and children against one of her daughters born out of deceased Narayanan and the other suit is filed by the defendant daughter against her mother and siblings for setting aside the Will executed by the father as

well as for a declaration that her mother is not legally wedded wife of deceased Narayanan and also to declare her title by adverse possession and further to set aside the sale deed Nos. 6579/1960 and 1232/1972. As has been found in the above decision, there is no family dispute between the plaintiffs and the defendant and the dispute is with respect to the property left behind deceased Narayanan. It is also the case of the plaintiffs that the Will has been executed by deceased Narayanan bequeathing his property among his wife and children including defendant. Both the 1st plaintiff and Narayanan is no more and other plaintiffs and the defendant are the legal heirs of the deceased Narayanan as well as the 1st plaintiff. So, the dispute to be resolved is only a property dispute among the mother and children and hence, it is purely a civil dispute and is not a family dispute to be resolved through a Family court. The question with regard to the institution of marriage or necessity to preserve the same also does not arise in these cases. So also the dispute between the plaintiff and the defendant can be resolved only on the basis of evidence to be tendered by either side. So the findings entered into by

the Munsiff's court as confirmed the Subordinate Judges court are not at all sustainable in law and hence are liable to be set aside.

In the result, impugned common order in O.S.Nos.133/2015 and 61/2016 as confirmed by the common judgment in A.S.Nos.10/2019 and 18/2019 is hereby set aside and cases are remanded to Munsiff's court, Karunagappally. Munsiff's Court is directed to dispose the cases at the earliest not later than four months from the date of receipt of certified copy of this judgment.

Sd/-

rps/

M.R.ANITHA, JUDGE