HIGH COURT OF KERALA

Justice Sathish Ninan

Date of Decision: 12th February 2024

RFA Nos. 217 and 462 of 2011

Vikrama Kaimal

VS

Vasumathikunjamma and others

Legislation and Rules:

Sections 32 and 33 of the Registration Act

Subject:

Appeals against the preliminary decree in a partition suit involving properties inherited from Rama Kaimal and Nandini Kunjamma. Key issues include the validity of a Power of Attorney (Ext.B10) and the existence and extent of the plaint 'A' and 'B' schedule properties.

Headnotes:

Partition Suit – Challenge to Preliminary Decree – Inheritance from Rama Kaimal – Misdescription of Property – Existence of Ext.B10 Power of Attorney and subsequent sale deeds questioned – 'A' schedule property conveyed under unchallenged Power of Attorney deemed not available for partition – 'B' schedule property found to be partible. [Paras 1-5, 8-10, 12, 16, 18, 19]

Power of Attorney (Ext.B10) – Question of Validity and Impact on Partition Suit – Plaintiffs' failure to challenge the Power of Attorney and subsequent sale deed based on it leads to dismissal of partition claim for 'A' schedule property – Legal principles necessitating the challenging of documents that impede title claims. [Paras 10-11, 13-15, 16]

Property Description and Existence – 'A' Schedule Property – Actual extent left open for determination at an appropriate stage – 'B' Schedule Property – Existence and partibility confirmed despite survey number errors and common boundaries with another property. [Paras 8-9, 19, 22-24]

Proportionate Reduction in Extent – If a deficit in the total extent of common properties, the extent to be fixed proportionately among sharers – Applicable to 'B' schedule property. [Para 20, 22]

RFA 462/2011 allowed – Judgment and decree regarding 'A' schedule property set aside, property not available for partition – Suit dismissed in respect of 'A' schedule.

RFA 217/2011 dismissed – Trial court's decision regarding 'B' schedule property upheld.

Parties to bear their respective costs. [Para 25]

Referred Cases:

- MD. Noorul Hoda v. Bibi Raifunnisa and Ors. (1996) 7 SCC 767
- Mabeeba Begum & Ors. V. Gulam Rasool & Ors. 1999 (2) APLJ 119 (HC)
- Rajni Tandon v. Dulal R. Ghosh Dastidar 2009 (3) KLT 607(SC)

Representing Advocates:

For the Appellant: Sri.K.K.Chandran Pillai (Sr.), Bobby Thomas, A.S.Sajush, Paul Thomas James Mundackal, Tony Thomas (Inchiparambil)

For the Respondents: Alex M. Scaria, Sri.C.K.Vidyasagar, Sri.Matthew John K, P.Chandy Joseph, Domson J.Vattakuzhy= = = = = = = = = = = = = = = = = = =

R.F.A. Nos.217 and 462 of 2011

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Dated this the 12th day of February, 2024

J U D G M E N T

The preliminary decree in a suit for partition is under challenge in these appeals. RFA 217/2011 is filed by the first defendant and RFA 462/2011 is filed by the defendants 8 and 12.

2. The plaint schedule consists of two items. Plaint 'A' schedule is described as 79.8 cents equivalent to 32.30 Ares in Sy. No.296/2-1 corresponding to R.S. 25/1 of Muttom village, and the plaint 'B' schedule is described as 58 cents equivalent to 23.48 Ares in Sy. No.290/1-B. Larger extent of properties including the plaint schedule properties belonged to one Rama Kaimal and his wife Nandini Kunjamma. It included certain family properties of Nandini Kunjamma also. Rama Kaimal had five children viz.

Vasumathi Kunjamma, Vikrama Kaimal, Padmakshi Aamma, Raghava Kaimal and Narayana Kaimal. On 16.10.1954, all of them jointly executed Ext.A1 Partition Deed in respect of the properties. In the said partition, the plaint 'A' and 'B' schedule properties were allotted to Rama Kaimal. The plaint 'A' schedule was included in 'A' schedule item No.1 in Ext.A1, describing the extent of property as 59 cents. In Ext.A1, the plaint 'B' schedule was included in 'A' schedule item No.2 therein. The said properties are sought to be partitioned between the legal heirs of Rama Kaimal.

3. The first plaintiff is the daughter-Vasumathi Kunjamma, the first defendant is the son-Vikrama Kaimal, plaintiffs 2 and 3 and the 7th defendant are the children of another daughter-Padmakshi Amma, defendants 2 to 6 are the legal heirs of another son-Raghava Kaimal, and defendants 8 to 12 are the legal heirs of yet another son-Narayana Kaimal.

4. According to the defendants, the description of the plaint 'A' schedule is not correct. The actual extent of plaint 'A' schedule is only 59 cents as is described in Ext.A1 Partition Deed. The property is not available for partition since, on the strength of Ext.B10 Power of Attorney dated 01.01.1997 executed by the plaintiffs and defendants 1 to 10 in favour of the 12th defendant, the 12th defendant had conveyed the property to the 11th defendant as per Sale Deed number 734/1999. With regard to plaint 'B' schedule, it was contended that, no such property exists.

5. The trial court, declined to recognize Ext.B10 power of attorney and the conveyance executed thereunder. Plaint ‘A’ schedule was held to be available for partition. With regard to the plaint 'B' schedule, the contention regarding the very non-existence of the property was negatived, and the property was held to be available for partition.

6. I have heard learned counsel on either side.

7. The point that arises for determination are :-

(i) When Ext.B10 power of attorney and the sale deed pursuant thereto are apparently executed by the plaintiffs, are the plaintiffs entitled to seek for partition of the property without seeking to set aside the documents ?

(ii) Was the trial court right in having refused to recognize Ext.B10 Power of Attorney and the conveyance executed based on the same?

(iii) Is the finding of the trial court regarding the availability of plaint 'A' schedule for partition, sustainable?

(iv) Is the finding of the trial court regarding the existence and availability of plaint 'B' schedule for partition, based on evidence and sustainable?

(v) Was the trial court right in holding that, if there is any deficit in the total extent available within the common boundaries of the plaint 'B' schedule and the property in Ext.B4 Gift Deed, the extent of properties are to be fixed proportionately?

8. Regarding the plaint 'A' schedule property, itis the contention of the defendants that the description by extent, as 79.8 cents, is not correct and that the actual extent is only 59 cents as mentioned in Ext.A1. The plaintiff would contend that, on re-survey, the actual extent is found to be 79.8 cents.

9. The suit is presently in the preliminary decree stage. Question regarding the actual extent of the property available, does not fall for determination in the preliminary decree proceedings. Therefore, the said contention is left open to be decided at the appropriate stage.

10. Regarding the plaint 'A' schedule it is the contention that, the plaintiffs, defendants 1 to 10 and the 12th defendant had jointly executed Ext.B10 Power of Attorney dated 01.01.1997 in favour of the 12th defendant. On the strength of the said power of attorney, the 12th defendant had executed Sale Deed No.734/1999 in favour of the 11th defendant. There is a further claim that the property was thereafter conveyed by the 11th defendant to one Stanley under Sale Deed No.894/2007. According to the defendants, the conveyance in favour of the 11th defendant was pursuant to a family

understanding. The first plaintiff as PW1, denied her signature in the power of attorney. According to her, for effecting mutation of the property she was required to sign in a white paper and that she never executed a power of attorney. It is contended that, Ext.B10 is seen to be attested by a Notary at Perumbavoor whereas most of the executants are residing in Thodupuzha and the property is situated at Thodupuzha.

11. The trial court observed that Ext.B10 is not a registered power of attorney and in terms of Sections 32 and 33 of the Registration Act, an unregistered power of attorney is not recognized for presentation of a deed of conveyance. Accordingly Ext.B10 power of attorney was discarded. It was also observed that, evidence to find a family arrangement is lacking.

12. The fact that, based on the power of attorney there had been a conveyance as Sale Deed No.734/1999 in favour of the 11th defendant by the 12th defendant, is not disputed. In the written statement the defendant had specifically set up Ext.B10 Power of Attorney and the Sale Deed. In spite of the same, the plaintiffs never chose to incorporate a relief in the plaint, challenging Ext.B10 and the sale deed. But for the case set up during the evidence as PW1, there is no pleading as against Ext.B10 Power of Attorney and the sale deed, nor was any relief claimed as against those documents.

13. The learned counsel appearing for the plaintiffs would contend that, the existence of the power of attorney and the sale deed was brought to the notice of the plaintiffs only through the written statement and that, but for a subsequent pleading in terms of Order VIII Rule 9 of the Code of Civil Procedure, and that too only with the leave of the Court, no further pleading is contemplated under the Code of Civil Procedure. Therefore, even without a plea and relief challenging the documents, it is open for the plaintiffs to disprove the documents by adducing evidence, it is argued.

14. I am unable to subscribe to the said contention. So long as the power of attorney and the conveyance made thereunder stands, the suit for mere partition could not be decreed. When there is a document which, on the face

of it appears to be one executed by the plaintiffs and where under their rights have been conveyed, it is necessary for them to get the document adjudged to be void or to get it set aside by seeking appropriate reliefs. In ***MD. Noorul Hoda v. Bibi Raifunnisa and Ors. (1996) 7 SCC 767***, the Apex Court held:-

"When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded."

In ***Mabeeba Begum & Ors. v. Gulam Rasool & Ors. 1999 (2) APLJ 119 (HC), it was held that, in respect of completed transactions to which a person is a party signatory, he has to necessarily file a suit for cancellation of the document without which any other relief sought for is not maintainable.***

15. Ext.B10 Power of attorney, on the face of it,contains the signatures of the plaintiffs and appear to be executed by the plaintiffs. On the strength of the power of attorney a sale deed has been executed. The suit for partition cannot be decreed on the face of Ext.B10 Power of Attorney and the conveyance based on the same whereunder the rights of the plaintiffs are purportedly conveyed. If it is the case of the plaintiffs that they had never executed Ext.B10 and that they were unaware of the existence of such a document, then, at least on the filing of the written statement they had notice regarding the power of attorney and the sale deed executed on the strength of the same. The plaintiff having come to know about the documents, they ought to have taken appropriate steps to incorporate appropriate reliefs in the suit challenging the documents. When the document on the face of it purports to be one executed by the plaintiffs, they cannot ignore the same even after they have knowledge/notice regarding the same. Unless the documents are avoided in a manner known to law, the clam for mere partition could not be maintained.

16. Therefore, when Ext.B10 power of attorney expresses itself to be one executed by the plaintiffs, and the rights of the plaintiffs have been conveyed thereunder, it is not open for them to ignore the same and seek for partition. They are bound to seek appropriate reliefs as against the said document. The mere suit for partition of plaint 'A' schedule is thus, bound to fail.

17. Now adverting to the reason given by the trialcourt with reference to Sections 32 and 33 of the Registration Act that, since Ext.B10 is an unregistered power of attorney it could not be recognized, in ***Rajni Tandon v. Dulal R. Ghosh Dastidar 2009 (3) KLT 607(SC),*** it was held that a person who executes a document by virtue of a power of attorney, is the actual executant of the document and is entitled to present it for registration, and that, it is only in a case where the power of attorney authorises only the presentation of a document for registration that Section 33 gets attracted. The Apex Court held :-

"29. Where a deed is executed by an agent for a principal and the same agent signs, appears and presents the deed or admits execution before the Registering Officer, that is not a case of presentation under S.32(c) of the Act. As mentioned earlier the provisions of S.33 will come into play only in cases where presentation is in terms of S.32(c) of the Act. In other words, only in cases where the person(s) signing the document cannot present the document before the registering officer and gives a power of attorney to another to present the document that the provisions of S.33 get attracted. It is only in such a case, that the said power of attorney has to be necessarily executed and authenticated in the manner provided under S.33(1)9a) of the Act.

30. In the instant case, Indra Kumar Halani executed the document on behalf of Shri N.L.Tantia under the terms of this power of attorney. He then presented it for registration at the Registration Office and it was registered. The plea taken by the Respondents that in order to enable him to present the document it was necessary that he should hold a power of attorney authenticated before the Sub-Registrar under the provisions of S.33 is thus not supported by the language of S.32. The

provisions of S.33 therefore only apply where the person presenting a document is the general attorney of the person executing it, and not where it is presented for registration by the actual executant, even though he may have executed it as against for some one else. In this case, the presentation is by the actual executant himself and is hence entitled under S.32(a) to present it for registration and to get it registered." Therefore, the trial court could not have discarded Ext.B10 power of attorney and the subsequent sale deed executed by relying on Section 32 and 33 of the Registration Act.

18. Plaint 'A' schedule property having been conveyed on the basis of Ext.B10 power of attorney, it was not available for partition and a decree could not be granted with regard to the same. The decree for partition granted in respect of plaint 'A' schedule property is liable to be interfered with.

19. With regard to the plaint 'B' schedule property, which is described as 58 cents in Sy. No.290/1-B, the defence contention is that such property does not exist. It is to be noticed that, under Ext.A1 Partition Deed, the first defendant was allotted 1.70 acres of property in Sy. No.290/1-A. It is the specific case of the first respondent in his written statement that, the description by survey number, of the 1.70 Acres allotted to him under Ext.A1 is a mistake and that the correct survey number is Sy. No.297/1. The mistake was realised while trying to effect mutation. Thereupon, Rama Kaimal-the father, executed Ext.B4 Gift Deed in his favour in respect of the 1.70 Acres showing the correct survey number viz. 297/1. It is not in dispute that survey number 290/1 is situated else where and the mentioning of survey No.290/1 as was belonging to the parties is a mistake. As noticed by the trial court, the boundary description of the 1.70 Acres of the first defendant which is referred above, and that of the plaint 'B' schedule property which is also described to be situated in Survey No.290/1 are one and the same. Therefore, it is evident that, there is an error in the survey number of the plaint 'B' schedule property and also in the 1.70 acres of the first defendant. In the cross-examination of the first defendant as DW1, he has admitted that the mentioning of Survey No.290/1 with regard to his 1 Acres and 70 cents in Ext.A1 is a mistake and that the correct survey number is 297/1. It is further admitted that the boundaries of the plaint 'B' schedule property and the said one Acre and 70 cents is one and the same. He has also admitted that there is a mistake in the survey number. A pointed question was put to DW1 that would it not have been correct if the survey number of the 58 cents included in plaint 'B'

schedule was mentioned as survey number 297/1, he answered in the affirmative. The relevant portion of the deposition of DW1 goes thus, “A]-«n-I 3þmw \-¼À B-bn AÑ-\p h-¨n-cn-¡p-ó 58 cent sâ survey number 2971-1 F-óm-bn-cp-óp F- ¦nð i-cn B-Ip-am-bn-cptóm (Q) i-cn B-Wv (A). Rm³ F-sâ h-kv-Xp-hnsâ survey number Xn-cp-¯n-¨p AÑsâ h-kv-Xp-hnsâ survey number Xn-cp-¯m³ Rm³ {i-aw \-S-¯n-bnñ. B h-kv-Xp C-t¸mÄ \n-§-fp-sS h-kvXp-hn-sâ `m-Kw B-bn tNÀ-¯p h-¨p A-\p-`-hn-¨p hcp-I Añ (Q) BWv (A) ap-àn-bmÀ Ir-Xr-aw B-bn F-sâ Xmev]-cy {]-Im-cw D-ïm-¡n F-óv]-d-ªmð i-cnbñ.”.

Therefore it could not be challenged that, the description of the plaint 'B' schedule by survey number is not correct. The plaint 'B' schedule and the 1 Acre and 70 cents belonging to the first defendant lie within the very same boundaries. The contention regarding nonexistence of plaint ‘B’ schedule property cannot be sustained.

20. The grievance of the first defendant is withregard to the finding of the trial court at paragraph 12 of the judgment. The finding reads thus :-

“. . . . . I find that if the actual extent of the property now in existence within the said boundary description is less than the extent of the respective properties in the partition deed then the properties are required to be identified within the said boundary description by proportionate reduction in the extent.”

The learned Senior Counsel would argue that the plaint 'B' schedule is in Sy. No.290/1 whereas the property belonging to the first defendant is in Sy. No.297/1. Therefore, the properties are different and there cannot be any proportionate reduction from the 1 acre 70 cents if it is found that there is any deficit in the total extent. It is also argued that the first defendant has obtained 1 Acre and 70 cents under Ext.B4 Gift Deed which cannot be related to the properties included in Ext.A1 Partition Deed. As regards the first contention, as noticed earlier, the mentioning of Sy. No.290/1 in Ext.A1 Partition Deed is a mistake. Therefore, the first contention goes.

21. Regarding the second contention, at paragraph10 of the written statement, the 1st defendant has pleaded thus :-

". . . . .As already stated in partition deed No.4350/1954, 1.70 Acres of property comprised in Sy. No.290/1 of Muttom Village was included in the F schedule and set apart towards the share of this defendant. In fact the F schedule and set apart towards the share of this defendant. In fact the survey number of the property is 297/1 which was mistakenly shown as 290/1. Hence even after the execution of the partition deed, the revenue authorities did not effect the mutation of the properties to this defendant's name. This mistake was ultimately detected in the year 1976 and in order to correct the revenue records, late Rama Kaimal had executed a gift deed in favour of this defendant in respect of the said 1.70 Acres of land. . . . . "

Therefore, it is the definite case of the first defendant that Ext.B4 was executed in respect of the property allotted to him in 'F' schedule in Ext.A1 Partition Deed and that since there was a mistake in survey number, a fresh document as Ext.B4 was executed to correct the revenue records. Therefore, the title claimed by the first defendant under Ext.B4 is not independent of Ext.A1 but is in respect of the very same property which was allotted to him in 'F' schedule in Ext.A1. First defendant never had a case of independent title over the 1 Acre and 70 cents under Ext.B4 dehors Ext.A1 partition. In fact his definite contention is to the contrary. Therefore, the said argument also fails.

22. As noticed, the boundary description on all the four sides of plaint 'B' schedule property and the property covered under Ext.B4 is one and the same. The properties lie within the common boundary and both were subject matter of Ext.A1 partition. If on actual measurement there is any reduction in the total extent, it has to be borne proportionately by the sharers. The trial court was right in having held so.

23. Learned Senior Counsel would next refer to the deposition of PW1 wherein he has in cross-examination stated that he has no quarrel with regard to the 1 Acre and 70 cents of the first defendant, and contend that, in view of the said admission, the first defendant is to be allotted the 1 Acre and

70 cents and only the balance if any, can be included in the plaint 'B' schedule. It would be relevant to refer to the said portion of the deposition. The same reads thus:-

“1þmw {]-Xn-bp-sS H-cp G-¡À 70 cent s\ ¸-än XÀ-¡w Hópw Cñ. B-Xp Iq-Sm-sX B boundary bv-¡p-Ånð
58 skâv Iq-Sn Dïv.”

The above statement read in its entirety cannot be understood to mean that the plaintiff seeks for partition of only the extent remaining after allotting 1 Acre and 70 cents to the first defendant. PW1 is in fact categoric that within the said boundaries lies the total extent of 1 Acre 70 cents and also the plaint 'B' schedule (58 cents). It is in the said background that he has said that he does not have any quarrel with the 1 Acre 70 cents of the first defendant. It doesn’t mean that he is satisfied the extent remaining after excluding the 1 acre 70 cents.

24. Finding of the trial court with regard to the partibility of plaint 'B' schedule property warrants no interference.

25. There is no challenge with regard to the sharesof the parties as allotted by the trial court.

In the result, RFA 462/2011 is allowed. The decree and judgment of the trial court in so far as it relates to the plaint ‘A’ schedule property is set aside. It is held that plaint 'A' schedule property is not available for partition. The suit in respect of the same will stand dismissed. The decree and judgment of the trial court with regard to the plaint 'B' schedule property warrants no interference. RFA 217/2011 is accordingly dismissed. Parties to bear their respective costs.