

**SUPREME COURT OF INDIA**

Ludina Pavanakumari

Vs.

Thankamma John (Dead) By Lrs.

C.A.No.5347 OF 2001

(G.S.Singhvi and Asok Kumar Ganguly JJ.)

18.11.2010

**ORDER**

1. This appeal is directed against the judgment of the learned Single Judge of the Kerala High Court, who allowed the second appeal preferred by the respondents, reversed the decree passed by the lower appellate Court and restored the preliminary decree passed by the trial Court for partition of the plaint schedule property.

2. George Puthukkery was granted Kuthakapattam right in respect of the suit property (land measuring 5.125 cents) comprised in survey Nos.8328 and 8329 situated in Quilon for a fixed period of 12 years commencing from 20.10.1949. He is said to have made some construction and lived with his two daughters, namely, Mariamma John and Thankamma John (respondents herein) and son, Stephan George Puthukkery. George Puthukkery died in 1958/1959 (in the judgment of the trial Court, the year of death has been shown as 1959 whereas in the judgment of the lower appellate Court, the year of death has been shown as 1958). During his lifetime, George Puthukkery married both the daughters. After the death of George Puthukkery, the land remained in possession of his son, Stephan George Puthukkery, whose daughter is the appellant. He paid tax and also raised construction after obtaining permission from the municipality vide memo Ex.B-8 dated 11.12.1963 and started residing in the building. He also set up Marama Chikitsalayam in the same year. Kuthakapattam right is said to have been given to Stephan George Puthukkery over 22.875 cents land comprised in survey Nos.8328 and 8329 including 5.125 cents in respect of which Kuthakapattam right was given to his father in 1949. After 14 years, the land was assigned to Stephan George Puthukkery vide G.O.Rt. No.853/77/RD dated 2.6.1977 issued by the State Government under Rule 9(2) of the Kerala Government Land Assignment Rules, 1964.

3. The respondents filed suit in the Court of Principal Munsiff, Quilon (trial Court) for partition of 5.125 cents land by asserting that the plaint schedule property belong to their father and after his death, they are entitled to get 1/3<sup>rd</sup> share each in accordance with the provisions of the Travancore Christian Succession Act 1092. The respondents claimed that they had asked their brother Stephan George Puthukkery, who was impleaded as sole

defendant in the suit to effect partition but he declined to do so. They further prayed for restraining the defendant from wasting or alienating the plaint schedule property. In the written statement filed by him, the defendant disputed the claim of the respondents and pleaded that he was in exclusive possession of 22.875 cents land including the plaint schedule land, raised construction and was living with his family and also running Marama Chikitsalayam. He further pleaded that both the respondents were married 40/30 years ago and they were living with their husbands and that he had got Kuthakapattam right over the property from the Government. During the pendency of the suit, Stephan George Puthukkery executed settlement dated 30.5.1983 (Ex.B-12) in favour of the appellant.

4. The trial Court vide its judgment dated 21.1.1984 decreed the suit and declared that the respondents are entitled to 2/3rd share in the plaint schedule property. The trial Court also restrained the defendant from committing any waste or obstructing the respondents from enjoying the properties till the partition was effected.

5. After the judgment of the trial Court, Stephan George Puthukkery appears to have died and, therefore, the appellant filed an appeal questioning the legality and correctness of the judgment and decree of the trial Court. Along with the appeal, she produced documents evidencing grant of Kuthakapattam right to her father, Stephan George Puthukkery over 22.875 cents land. She also produced patta issued by the Government and the settlement deed executed in her favour. The respondents opposed the marking of the documents produced by the appellant by contending that the same were neither referred to in the written statement nor produced before the trial Court. Thereupon, the counsel for the appellant made a prayer that the case be remanded to the trial Court for fresh disposal. The lower appellate Court accepted his prayer, allowed the appeal, set aside the judgment and decree of the trial Court and remanded the case for fresh disposal of the suit filed by the respondents.

6. In furtherance of the direction given by the lower appellate Court, the trial Court re-evaluated the evidence produced by the parties, referred to the assignment of 22.875 cents land to Stephen George Puthukkery and held that the buildings were constructed on the plaint schedule property by the defendant himself with his own funds and the respondents do not have any right over the same. Notwithstanding this, the trial Court held that the plaint schedule property is identifiable as part of 22.875 cents land covered by Ex.B-6 and the respondents are entitled to get 2/3rd share in it. The trial Court also referred to the judgment of this Court in *Mary Roy v. State of Kerala*<sup>1</sup> wherein it was held that Travancore Christian Succession Act 1092 stood repealed with the extension of Indian Succession Act, 1925 to the State of Travancore-Cochin by virtue of Section 3 of the Part B States (Laws) Act, 1951 and proceeded to observe that the respondents are entitled to share in the property of their father. The appellant challenged the judgment and decree in AS No.87 of 1989, which was allowed by the lower appellate Court vide its judgment dated 27.11.1989. The lower appellate Court noted that tenure of Kuthakapattam right given to George Puthukkery had come to an end on the expiry of 12 years and as such the respondents were not entitled to their so called share in the plaint schedule property. The lower appellate Court also referred to the assignment of 22.875 cents land in favour of the defendant vide Ex.B-6 and held that the respondents have

no right to seek partition of the plaint schedule property. The High Court noted that the question of law raised in the second appeal centered around Section 90 of the Indian Trust Act, referred to the documents marked Exts. A1, B6, B7 and held that the trial Court was justified in decreeing the suit because in spite of the permission granted by the lower appellate Court, the defendant Stephen George Puthukkery did not amend the written statement to raise contentions based on Exts. B6 and B7. However, the learned Single Judge did not frame any specific substantial question of law as per the mandate of Section 100 of the Code of Civil Procedure and allowed the second appeal by assuming that being the heirs of George Puthukkery, the respondents have a right to seek partition of the property which was granted to their father as Kuthakapattam.

7. We have heard learned counsel for the parties and carefully scrutinised the records. In our view, the impugned judgment is liable to be set aside only on the ground that the learned Single Judge failed to notice that the tenure of Kuthakapattam right given to George Puthukkery in 1949 had come to an end some time in 1961 and as on the date of filing the suit the respondents did not have any tangible right in the plaint schedule property. The learned Single Judge also did not pay due attention to the facts that after 1961 the land remained in possession of Stephan George Puthukkery, who paid tax and constructed building after obtaining permission from the municipality; that Kuthakapattam right was given to Stephan George Puthukkery in respect of 22.875 cents land including the plaint schedule property and in 1977 the same was assigned to him under Rule 9(2) of the Kerala Government Land Assignment Rules, 1964 and thereby he had become absolute owner of the entire property, which was transferred to the appellant in 1983. Admittedly, the respondents had not challenged the assignment of land in favour of Stephan George Puthukkery. Therefore, they had no right to claim partition of the plaint schedule property and the trial Court and the High Court gravely erred in passing a decree in their favour.

8. In the result, the appeal is allowed, the impugned judgment is set aside and the one passed by the lower appellate Court is restored. As a sequel to this, the suit filed by the respondents is dismissed. The parties are left to bear their own costs.

<sup>1</sup>1986 KLT 508 = (1986) 2 SCC 209